RAPPORTS JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC

RAPPORTS

JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC

COMPRENANT LA

REVISION COMPLÈTE ET ANNOTÉE DE TOUTES LES CAUSES RAPPORTÉES DANS LES DIFFÉRENTES REVUES DE DROIT DE CETTE PROVINCE JUSQU'AU 1er JANVIER 1892

AINSI QUE

DES CAUSES JUGÉES PAR LA COUR SUPRÊME ET LE CONSEIL PRIVÉ SUR APPEL DE NOS TRIBUNAUX

PAR L'HONORABLE M. MATHIEU

Juge de la Cour Supérieure de Montréal, professeur à la Faculté de Droit de l'Université Laval à Montréal

---

TOME VIII

MONTREAL

C. O. BEAUCHEMIN & FILS, LIBRAIRES-IMPRIMEURS

256 et 258, rue Saint-Paul

—

1894

CAUSES RAPPORTÉES

DANS CE VOLUME

F

G

H

I

J

K

L

M

N

O

P

R

ABRÉVIATIONS.

P. D. T. M. :—*Précis des Décisions des Tribunaux du district de Montréal*, 1854, par T. K. RAMSAY et L. S. MORIN, avocats.

D. T. B. C. :—*Décisions des Tribunaux du Bas-Canada* en 17 volumes, commencées en 1851, par MM. LELIÈVRE, ANGERS, BEAUDRY et FLEET, avocats.

J. :—*Lower Canada Jurist.*

R. J. R. Q. :—*Rapports Judiciaires Revisés de la Province de Québec*, par le Juge MATHIEU.

C. C. :—*Code Civil du Bas-Canada.*

C. M. :—*Code Municipal du Bas-Canada.*

C. P. C. :—*Code de Procédure Civile du Bas-Canada.*

S. R. Q. :—*Statuts Refondus de la Province de Québec.*

S. R. C. :—*Statuts Revisés du Canada.*

C. B. R. :—*Cour du Banc de la Reine* ou *Cour du Banc du Roi.*

C. S. :—*Cour Supérieure du Bas-Canada.*

Co

Co

DA

the
con
der
the
Pa

Hu

exc
and
2.
cust
acc

(1

RAPPORTS JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC.

APPEL.—PROCEDURE.—FACTUM.

COURT OF QUEEN'S BENCH, IN APPEAL,
Montreal, 1st September, 1859.

Coram Sir L. H. LAFONTAINE, Bart., Chief Justice, AYLWIN, J. DUVAL, J., MEREDITH, J., C. MONDELET, J.

DAWSON (Defendant in the court below), Appellant, and BELLE (Plaintiff in the court below), Respondent.

Held: That the Appellant who has failed to fyle his *factum* within the delay prescribed by the rules of practice, will be relieved from the consequences of his default, by producing the *factum* when the Respondent makes a motion to have the appeal dismissed in consequence of the Appellant not having fyled his factum within the delay prescribed. Party in default to pay costs of motion. (1)

Motion dismissed. (3 *J.*, p. 256.)
E. BARNARD, for Appellant.
BELLE and GERMAIN, for Respondent.

CARRIER.—RESPONSIBILITY.

SUPERIOR COURT, Montreal, 30th June, 1859.

Coram SMITH, J.

HUSTON *vs.* THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Held: That a common carrier is "liable for all loss or damage, except that occasioned by the act of God and by the King's enemies and by inevitable accident and *vis major*."

2. That proof to the effect that the goods, placed by Plaintiff in the custody of Defendant, were destroyed by a fire which could not be accounted for otherwise than by the presumption that it was the result

(1) V. art. 1131 C. P. C.

of spontaneous combustion, does not constitute inevitable accident or *vis major*.

3. That proof to the effect that Defendant had, previous to and at the time of the fire, posted up in all the Company's stations, with other printed conditions, a notice that the Company would not be responsible "for damages occasioned by delays from storms, accidents or unavoidable cause, or from damages from fire, heat, &c."; that a similar notification and similar conditions were printed on the back of the Company's advice notes to consignees as to the arrival of goods, and that Plaintiff had been seen, on a previous occasion, reading such conditions and notification, does not constitute an agreement between Plaintiff and Defendant that the goods in question were to be carried on those terms, particularly in the face of a simple unconditional receipt given by the Company for the goods as in the present case.

4. That a common carrier cannot be exempted from liability even where such agreement is proved, if he be guilty of negligence.

This was an action for the recovery of £63 18s. 2d. being the value of goods delivered to the Company Defendant, at the Point Levi station, on the 12th of December, 1856, for the purpose of being forwarded by rail to Stanford, and there delivered to Plaintiff, but which were not so delivered; the Company's agent, at Point Levi, signing a simple receipt therefore containing an undertaking to forward and deliver the goods as above. Defendant pleaded that the goods were so delivered for transport, by its ordinary freight trains only, which, at that time, to Plaintiff's knowledge, left Point Levi on the Monday, Wednesday and Friday only in each week; that, being delivered on a Friday, they could not be despatched before the following Monday; that, on that Monday, there occurred so heavy a fall of snow that the trains of the day could not leave; that, during the night following, the goods were totally destroyed, without fault of Defendant, by a purely accidental fire, which consumed also the whole of Defendant's station house, at Point Levi, in which they were, with all its other contents, to the loss of Defendant in an amount of at least £20,000; that, through the year 1856, the Company had kept posted up, at Point Levi and at its other stations, notices whereby it had made known to the public, and to Plaintiff in particular (who, as was alleged, had, before, caused goods to be forwarded on its railway on the same conditions) that it would not be responsible for accident from delays occasioned by bad weather, or from fire, heat, cold or other like cause, or from *force majeure*.

BETHUNE, for Plaintiff, argued that the Company had wholly failed to establish its plea of *vis major*, 1st. as to the fire, it was in evidence that the station house, in which the fire occurred, was built entirely of wood; that the fire was first seen in the lamp-room which was partitioned off in wood, and was, moreover, warmed by a stove; that, in this wooden room, thus warmed, the Company kept a considerable quantity of

waste, a material well known, and in fact proved, by the Defendant's own witnesses, to be most liable to spontaneous combustion, and that the fire could only be accounted for by the presumption that the waste had spontaneously ignited. It is quite clear, therefore, that, so far from the fire being the result of a *vis major*, it was solely attributable to the culpable neglect of the Company, in exposing such combustible materials, in such a quantity, and in such a combustible apartment; 2nd. as to the snow storm, it is not satisfactorily proved that the storm was so violent as to prevent the freight train from being forwarded, had the Company had on hand (as they were bound to have had) the necessary locomotive power to propel it, and, on the contrary, it is evident, from the fact that the passenger train, which was despatched at the hour the freight train ought, in ordinary course, to have left, with the only two engines then at the station, went through without accident or difficulty; that it was not the storm, but rather the want of the necessary locomotive power, which prevented the freight train from leaving, as it otherwise would have done. Then, as to the pretended limitation of liability of the Company, by reason of certain printed notices, he submitted, as a legal proposition, that nothing short of an absolute agreement by Plaintiff to have his goods forwarded on the terms contained in such notices, could make Plaintiff amenable to them; that, in the present case, not only was no such agreement proved, but, on the contrary, the receipt given for the goods, which was the contract between the parties, contained no conditions whatever in favor of the Company, and was a simple undertaking on its part to carry the goods to Stanfold, and there deliver them to Plaintiff. The fact that Plaintiff was once seen reading the printed conditions on one of the Company's advice notes, and which it may even be said could only be held to have application to goods in the position of those contained in the advice note, that is goods ready for delivery, is so unimportant in the face of the Company's written undertaking as recorded in the receipt, that no weight whatever can be attached to it by the court. But, even supposing Plaintiff had specially agreed to the terms of the printed conditions, the manifest negligence of the Company, both as respects the fire and the detention of the freight train for want of an engine or engines to draw it, must still render Defendant liable to pay for the loss of the goods. The following authorities were submitted on behalf of Plaintiff. Angell, on *Carriers*, § 126, 236, 237; 1 Bell's Com., p. 472 and seq., art. *Limitation of responsibility*; Flanders, on *Shipping*, n[os] 457 to 462 inclusively; *Samuel* vs. *Edmundstone et al.*, 5 *R. J. R. Q.*, p. 449.

MACKAY, for Defendant, contended that the French law must govern in this case; that, where no *faute lourde* was to be seen on the part of the carrier, he was relieved, in all cases of *force majeure* and *cas fortuits*. Rep. de Guyot, vo *Cas fortuits*, p. 732; Anc. Den., *vo Incendie*; Rep. de Guyot, vo *Incendie*, pp. 119, 123 et vo *Faute*. pp. 297, 299; *Code de com.*, art. 103; *Code civil*, art. 1784. In France, fire was regarded as a *damnum fatale*, for which *personne n'en est garant*. Anc. Den., vo *Incendie*. Also, in Scotland, 1 Bell's Com., p. 470. Even under the English law, before the 11 Geo. IV and 1 Wm. IV, Defendant would not, in a case like this, be held liable, and this by reason of the printed notices of which Plaintiff had knowledge. 4 Campbell's R., pp. 40, 41; 2 Greenleaf, on Ev., § 216, 218; Shelford, on Railways (by Barnett), Note 1 on page 714.

PER CURIAM: The defence in this case rests on two points: 1st. That the goods were received by Defendant on a Friday, to be forwarded by the first freight train; that a violent snow storm occurred on the night of Sunday, which rendered it impossible to forward the train on Monday morning, although the passenger train was sent forward with two engines; that, during the necessary detention, the fire occurred; that it was the result of inevitable accident, and that no blame could attach to Defendant, and that, by law, they are not liable for the loss; 2nd. That the general liability of Defendant, as common carrier, was restricted by printed notice to that effect, posted up in all the stations, and printed on the back of the Company's advice notes; that this restricted liability was known to Plaintiff, not only from previous dealing, but from actual knowledge, and that, by these printed notices, the Company declared that it would not be held liable for delays occasioned by snow storms and for losses by fired. Plaintiff maintained that the freight train might have been forwarded, as well as the passenger train; that there was no great or sufficient cause for not sending on the goods, according to the tenor of the contract, that they should be forwarded without delay; that in this there was negligence on the part of Defendant, and, therefore, a liability in law to account for the value of the goods which were destroyed or lost to Plaintiff during this unjustifiable detention; and 2d ground of defence, that the liability in law of the common carrier was for all losses except those occasioned by the act of God and the Queen's enemies; that this common law liability could not be restricted by mere general notice, even if knowledge of such notice had been brought home to Plaintiff, which it was not; that the fire was the result of negligence on the part of Defendant, who must be held liable in law, and that it was

not competent to Defendant to limit his liability by any general notice, so as to avoid liability for losses caused by negligence. As to the first ground of defence, that the delay in forwarding the goods, by the snow storm, is one for which Defendant cannot be held liable, it is necessary to distinguish. The mere detention of the goods by the forwarder, during a time of stress of weather, such as a violent snow storm, cannot of itself render the carrier liable, provided the carrier exercised a sound and wise discretion ; no doubt the carrier is bound to exercise diligence in the transmission of the goods confided to his care, but it cannot be contended that a carrier is bound, at all events, to forward goods when it would be either dangerous or unwise start on the journey. Now, in a climate such as ours is in the winter months, it would be manifestly unjust to say that a railroad carrier should be compelled to proceed on his journey, in the face of a violent storm which would of necessity arrest him altogether or impede him in his journey. Some discretion must be allowed to the carrier, and the law allows and justly so, to the carrier the exercise of this sound discretion in carrying safely the goods confided to his care. Their detention, by snow storms, must necessarily enter into consideration, in settling the liability of railroad carriers in this country, for, otherwise, it would be imposing obligations on the carrier, which sometimes it would be wholly out of his power to meet and impose duties on him which are not consistent with the essential and inherent obligation of his contract. It is a question of evidence entirely to determine whether or not in not forwarding the goods the carrrier exercised a sound discretion or not. On this occasion, a violent snow storm arose, which blocked up the road and so impeded the track, as to justify a delay until the track was cleared, and, in so far as the mere delay is concerned, I think Defendant was justified in not proceeding on his journey. It is no argument to show that a passenger train was despatched although with two engines, and that, if a passenger train could start, a freight train might have been sent on. This does not follow for there might exist many reasons for endeavouring to forward passengers, which would not exist in respect of freight, and it is not a question of possibility, but a question of prudence. In so far then as the mere fact of the detention is concerned, Defendant cannot be held liable. But the liability of Defendant is not in this case altered by the detention. For the goods once received by Defendant, and placed on board of the cars for transportation, the carrier is liable during the necessary detention in the same manner, as if the goods were in process of transportation, and this brings me to the point of the defence that the loss, under the cir-

cumstances, is not one for which Defendant can be held liable at all, in other words, that the limitation of liability by the printed notices, in respect of accidents by fire, is binding on Plaintiff, and that the accident itself in arising, as it is pretended it did, from no fault or negligence of Defendant, and being the result of inevitable accident or *vis major*, Defendant is not liable. Defendant contends that, by the law of Lower Canada, he is not liable for the loss of the goods by the fire in question: 1st on the ground that the printed notices restricted his liability, and 2nd that it was an accident in respect of which no default or negligence can be imputed to him. Defendant contended that the strict rule of the English law, which rendered common carriers liable for all loss except that which arose from the act of God and the Queen's enemies, did not exist in Lower Canada, and that the more indulgent rule of the French law, which must be the rule in Canada, relieves them from all liability for loss arising from mere casualty, or inevitable accident or from *vis major*. By the law of England, the rule has been well settled, from the time of Lt. Holt, *vide* case of *Coggs* and *Bernard*, 2 Ld. Raym, R. 909. Angell; in laying down the principle, says : (S. 148.) " That a common carrier is answerable, as has been already stated, for all losses which do not fall within the excepted cases of the " act of God " and the " King's (public) enemies," and, with reference to the doctrine of *vis major*, he remarks : (S. 155) " the term *vis major* (superior force) is used in the civil law in the same way that the words " act of God " are use in common law, and so also is the term *casus fortuitus*." It is true one or two cases can be found in which there has been a departure from this uniform rule. But these cases have formed no precedent for the english courts, and they have been uniformly rejected in the United States courts, and they have been justly considered as a departure from the sound principles of law. Moreover, these few cases on which such decision have been based, refer to this class of cases when valuable goods were transmitted, for the usual prices of small parcels of no great value, without mention of their valuable contents to the carrier, and notice has been given by the usual posting up in the offices of the carriers, that they would not be held liable for the loss of such valuable parcels, containing jewellery and precious stones, unless notices of their contents had been given and an adequate remuneration paid for transmission. The case cited, and others which might be cited, have reference exclusively to this class of cases, but I think none can be found in which a notice restricting liability in case of fire, has been held as binding. This departure from established principle created much inconvenience, and at length, the statute 11 Geo. IV, and

1 Wm IV, was enacted which settled the point, and by this act, in England, general notices are therefore declared not to take away the general liability of carrier. At this present time therefore, in England, the doctrine is now well settled, that a special notice and undertaking must be alleged and proved, in order to limit the liability, in cases in which a limited liability can be by law set up, and in cases in which no fault or negligence can be inputed to the carrier. This principle also obtains in France, with the exception that the carrier is not liable, when the loss can be fairly imputed to *vis major* or inevitable accident. On this point, I refer again to Angell, (S. 148.); Story, Bail (S. 488), in which this principle is laid down. The doctrine on this point in England and in France is based on the edict of roman prœtor. But the English rule is even more strict in this respect than the Roman law; for it excludes the carrier from protection, in all cases except where the loss has arisen from the act of God or the Queen's enemies, whereas the Roman law saved the carrier in cases of loss from *vis major*; this is the only difference in the two systems. In all other respects, they are alike. This principle of the Roman law is incorporated into the French law, and it is to be found confirmed in the *Code de commerce*. In Persil and Croissant, on *Commissionnaires*, p. 181, and seq., the whole doctrine is well discussed and plainly laid down. A judgment is there cited which was discussed on all the points and finally decided in the *Cour de Cassation*. The decision there clearly established the principle that the carrier is liable for loss by fire, which is not the result of *vis major*, or of inevitable accident, and where the carrier could by no possibility exercise any control, and this decision also equally establishes the fact that, between the English and French systems, there is no difference except in this, that the carrier is relieved in the case of *vis major*. This view of the case has been sanctioned in our Provincial Court of Appeal, in the case of *Hart* and *Jones*. (1 *R. J. R. Q.*, p. 422.) This distinction then between the two systems of law leads to the consideration of the meaning of the words *vis major* or inevitable accident. On this point Angell says: As before shown that the expression *vis major* in the civil law is used in the same way that the words "Act of God" are used in the common law. The true principle is that the loss occurred from some cause in which the act of man cannot be traced, for, if the act of man be traceable, either in some act of commission, or some cause of omission, which involves an act of negligence or fault of any description, then, it is no longer a case of *vis major* or inevitable accident, for the law presume that such loss might have been avoided. To suppose that,

because a loss could not be prevented, simply from the fact of not being able to prevent the loss, although the cause of that loss is to be traced up to some source, having its origine in the act of man, is a departure from true principle. The case of irresistible force supposes some act independent of the act of man, and which no prudent foresight or care on the part of the carrier could by any possible means prevent. Thus, in the present instance, the origine of the fire has not been established in evidence, for the evidence of Defendant goes merely to the effect, that in the opinion of the witnesses, it arose from spontaneous combustion in the waste room. This, however, is mere opinion. It is not said particularly to have arisen from that cause. But, supposing it to be so proved, it simply proves that an undue amount of combustible matter was left in the room, and that it therefore ignited; now, it is quite possible the fire, under the circumstances, could not be prevented, but surely, the cause of the fire could have been prevented. This is an act of negligence and want of care to allow a quantity of combustible matter to accumulate where it was liable to create combustion. It was then the duty of the person employed by Defendant to know that a fire might be the result of this undue accumulation. The carrier is bound to possess sufficient skill in the use of the vehicles of transportation employed by him in his calling to ensure safety in their use. If it be necessary to use oils and other materials in the running of the railroad carriages employed by him in his trade, it is equally incumbent on the carrier to know how to use the vehicles with safety. To allow an unnecessary accumulation of materials in the waste room, by means of which a fire may be the result, is clearly, in my opinion, a want of sufficient skill and care which must carry with it a liability to make good all losses proceeding from that cause. The carrier has complete control over his own department. The merchant trusts his goods to him on the implied contract, that there is nothing dangerous in the means of transportation, and, if there be danger, that the carrier possesses the requisite skill to avoid that danger; now, if any material be allowed to accumulate which possesses, in itself, the element of destruction, and a fire ensues, it is to my mind negligence which renders the carrier chargeable with the loss resulting from it. But, in this case, the cause of the fire has not been shown in evidence, and, in such a case, the law imputes negligence to the carrier, unless he can account satisfactorily for the fire. The *onus* of proof is thrown on the carrier, and the rule is that unless persons charged with the custody of the property of others can account satisfactorily for the loss, the law imputes to them negligence, and consequently liability. Defen-

dant also contended that, as by the notices on the advice notes, loss by fire was excluded, that in this case, Defendant could not be held liable. But, admitting that the notices in question had such effect, it remains to be shown whether, under the supposition that the fire might be fairly attributed to the negligence of Defendant, such a contract, even if proved, could discharge Defendant from liability. On this point, I am against Defendant; see Addison, *on contracts*, p. 509 and sec. 9 (Am. Ed. 1857). By the authorities, it appears to me that such a contract could have no legal effect. From the preceding remarks, I draw the following conclusions. (1) 1. That, by the law of Lower Canada, carriers are liable for all losses not resulting from the act of God, the Queen's enemies, or from *vis major* or inevitable accident; 2. that, by the law of Lower Canada, *vis major* and inevitable accident are equivalent terms; 3. that mere knowledge of the existence of general notices does not restrain the liability; 4. the knowledge of the existence of general notices is not proved; 5. that the fire in question was not caused by *vis major* or inevitable accident, but was the result of negligence on the part of Defendant, and that the cause of the fire not being established, the law presumes that it was caused by negligence; 6. that any stipulation made by Defendant not to be held liable for loss by fire resulting from the negligence of Defendant, either proved or implied, is illegal, and cannot restrict the liability of Defendant. I am, therefore, of opinion that Defendant must be held liable for the loss complained of and judgment should go against Defendant.

" The court, considering that Plaintiff hath fully established the material allegations of his action; and, further, considering that Defendant hath failed to prove, by legal and sufficient evidence, the existence of any special contract or undertaking between Plaintiff and Defendant, or of the knowledge by Plaintiff of the existence of any general notice, by which Defendant sought to limit his common law liability as a common carrier, or of any acceptation of such limited liability by Plaintiff, of any act done by Plaintiff, by reason of which he can be considered to have contracted with Defendant, so as to limit the general liability of Defendant, as such common carrier, can in this case, be limited or restrained, and, further considering, that, by law, Defendant is liable for all loss or damage, except that occasioned by the act of God, and by

(1) The learned judge cited the following authorities : Anc. Denisart, t. II, vbo *Incendie* ; Guyot, *Paris*, A. D. 1784, vbo *Incendie*, t. IX, pp. 121, 127 ; Nouv. Denisart, *Paris*, A. D. 1786, vbo *cas fortuits*, t. IV, p. 252, nos 1, 2, p. 254, no 2, p. 255, no 4 ; Persil et Croissant, *sur les commissaires*, Paris, A. D. 1836, Art. 103, pp. 184, 192, 193, 200, nos 4, 6, 9, 10, 12.

the King's enemies, and by inevitable accident and *vis major;* and further considering, that Defendant cannot be exempted by agreement from liability for any act, or from loss and damage caused by the negligence or fault of Defendant; and, further, considering, that the loss in question was occasioned by the negligence of Defendant, and was not occasioned by inevitable accident or *vis major*, and for which Defendant is liable in law to indemnify Plaintiff, the court doth condemn the campany, Defendant, to pay the said Plaintiff, etc." (3 *J.*, p. 269.)

BETHUNE and DUNKIN, for Plaintiff.

CARTIER and BERTHELOT, for Defendant.

R. MACKAY, Counsel.

CARRIER.—RESPONSIBILITY.

COURT OF QUEEN'S BENCH, Montreal, 31st May, 1860.

Coram: Hon. Sir L. H. LAFONTAINE, Bart., Ch.-J., AYLWIN, J., DUVAL, J., MONDELET (C.), A.-J., BADGLEY, J., *ad hoc.*

THE GRAND-TRUNK RAILWAY COMPANY OF CANADA (Defendant in court below), Appellant, *and* MOUNTAIN & HUSTON (Plaintiffs in court below), Respondents.

Held: That a common carrier, in the case of goods placed in his custody, and destroyed by a fire which could not be accounted for otherwise than by the presumption that it was the result of spontaneous combustion, caused by waste kept by the carrier in the building where he temporarily stored the goods, is liable for the loss, although he may have previously notified the public that he would not be responsible for damages occasioned by delays from storms, accidents, or unavoidable causes, or from damages from fire, heat, &c." (1)

This was an appeel from the judgment rendered by the Superior Court, at Montreal, of which a report is to be found *supra*, p. 9.

BADGLEY, J., dissentiens: I do not differ from the rest of the court with respect to the liability of common carriers; but there were exceptions which diminished the liability, when the goods were carried in accordance with a special contract. That was the defence of the company in this case, that the goods were destroyed by *force majeure*, and that they were accepted by the Company under a special contract. At the time of the fire, the Railway Company was only running trains twice a week. The goods were intended to go by the Friday train, but were too late, and were, therefore, kept over to go by the Tuesday train, but, unfortunately, on monday night

(1) V. art. 1675 C. C.

the station took fire and the merchandise was burned. It was in evidence the Company had, previously to this, notified the public that they would not be responsible for loss by fire, and that this was communicated to the public by advertisement, and by papers stuck up in the various stations. It was only necessary to add, on that head, that the knowledge of such notice having been given was satisfactorily brought home in both cases; in Huston's case, it being proved that he had actually read the notice. Under these circumstances, the case turned chiefly on the question of negligence whether the Company, not being liable in all the responsibilities of common carriers, were yet liable for all negligence to take the proper precautions to secure the goods committed to their charge. Now, the authorities showed that different degrees of diligence were required under different circumstances. When a thing is delivered for the benefit of the *balles* alone, the utmost degree of precaution is required; and, when, for the advantage of both, as in the case of goods to be carried for a profit then so much care as a prudent man would take of his own goods. As to the responsibility of common carriers, I admit that it extended, in England, to everything but the act of God and the King's ennemies. But the civil law excepted robberies, and, in general, *force majeure,* so that steamboat proprietors in Louisiana had not been held liable for loss by fire, when proper precautions had been used. In our own courts, it had been held that the carrier was responsible for loss by fire, if caused by any human act. However, the point here was that the goods were accepted under special contract, the carrier undertaking to convey the goods at less than the ordinary rates, and the other party agreeing to accept a less amount of liability on the part of the carrier. According to Story, such contracts might be implied, and might be made by public notice duly given by carriers, of their terms and liabilities; and when the knowledge of such notice was brought home to the *bailors*, it was deemed proof of the contract, and converted the general law into a special liability. (His Honour have quoted several English cases, to show that the same view of the law prevailed there.) I think, therefore, that here the liability was nothing more than to use that degree of precaution, which a provident man takes of his own property; and then what were the facts? The station master, at a late hour of the night of the fire, went round the premises and into the room adjacent, to that where the fire originated, looked through a glass window and saw nothing wrong, and then returned to bed. But the Company also kept a night watchman, who examined the premises at two or three o'clock in the morning, when everything appeared to be right. The only evidence as to the origin

of the fire was that of two witnesses who thought it occurred from the spontaneous combustion of cotton waste used for wiping that oil off the machinery. But there was nothing to show neglect in that case. The Company had themselves lost all their buildings, and they had taken every precaution that could be required. It might indeed be said that they ought to have taken precautions against this spontaneous combustion of the waste. But there was no proof that the fire had really arisen from that cause. I think, therefore, the Company ought not to be held liable, and that the judgment of the court below should be reversed.

LaFontaine, Ch. J.: Cinq témoins ont été entendus de la part de la Défenderesse : Le premier est Symmons, employé au service de la Défenderesse. Lors de l'incendie, il restait dans le hangar de la station. "The goods referred to were actually packed in freight car for shipment, and would have been sent off on Monday, the day before the fire, but for a storm of snow, a pretty smart storm, we ran no freight train that day. It was not an extraordinary stormy day, though very sharp, the snow was drifting a good deal."…. "Before going to bed, on the night of the fire, I did what was my invariable practice, namely, walk round the building, just to see that all was safe. I saw no fires or lights lying negligently about any where. I passed by the lamp-room, which had a half glass door, and saw no spark of light in that lamp-room. I was suddenly awakened out of my sleep, on the night of the fire, by the alarm of fire, and I discovered the station was on fire, and the flames were proceeding from the upper part of the lamp-room, and the fire proceeded irresistibly"…. Parlant de ce qui avait pu être la cause de l'incendie, le témoin dit : "It was the combustion of oily waste used for cleaning lamps, in my opinion…. In the lamp-room are kept such waste, also oil for the lamps, and lamps and wicks, turpentine and other lamp apparatus. Such stuff as that waste would be liable to spontaneous combustion. Of course, I did not see the fire actually commence, but I cannot attribute it to anything else but that. I think it was an accidental fire." Le 2e témoin est Carroll, aussi au service de la Compagnie : "I was night watchman that night…. walked round at a late hour…. saw no light in the lamp-room…. afterwards saw fire in the lamp-room. I was so confused at the moment that I did not give an immediate alarm I forced in the lamp-room door. The greatest body of the fire was in a corner of the room where I saw the waste on fire." Ce témoin avait aussi dit : "I do not know that, on the day before the fire occurred, there was a snow storm, but it was a cold night, and there was snow on the ground then." Le 3e témoin est Webs-

ter, surintendant du Grand-Tronc, lors de l'incendie; il restait alors dans l'hôtel Victoria, près de la station, à la Pointe Lévy : "The cause of the fire could never be explained. It was supposed to be a spontaneous combustion by waste, at any rate accidental...." En conséquence de la chute de neige de lundi, 15 décembre, le témoin empêcha le train de fret de partir et ne fit partir que celui des passagers avec deux machines à vapeur. "I believe there were not more than two engines at the Point Levy Station available on that morning." Le 4e témoin est Pennington, aussi au service de la Compagnie: "I made examination in the causes of the fire.... and I could find nothing to indicate it to be other than spontaneous combustion; all other cause for it is unknown.... *Waste, such as necessarily must be kept in such a lamp-room, has been known to ignite spontaneously, particularly if oiled.*" Le 5e et dernier témoin est James Meagher au service de la Compagnie jusqu'au mois de juin 1856 : "I have seen as much as fifty pounds of waste in the lamp-room, at Pointe Levy, and I have seen as little as ten pounds. The latter quantity was too little." Il n'est pas prouvé, dans cette cause, que le Demandeur ait eu avis du placard contenant les conditions que la Compagnie avait cru devoir établir d'elle-même pour se soustraire à toute responsabilité, cela a été admis lors de la plaidoirie à l'audience. Ainsi, on ne pourrait pas même inférer que, dans cette occasion, il se soit soumis à ces conditions. Il est prouvé que l'édifice en question était tout de bois, que la chambre aux lampes en faisait partie, et qu'elle n'était séparée du reste de l'édifice que par une cloison de bois. La seule cause de l'incendie n'a pu être au dire des témoins de la Défenderesse, que la combustion des rebuts de coton (waste), qui a dû avoir lieu dans cette chambre aux lampes, lesquels rebuts étaient plus ou moins imprégnés d'huile. Il y avait aussi là de l'huile et d'autres matières inflammables. Ce témoignage, surtout celui de Pennington, est la condamnation de la Compagnie. Toutes ces choses inflammables d'elles-mêmes n'auraient pas dû être laissées dans ce grand édifice en bois. Elles auraient dû être placées dans un édifice séparé, assez éloigné du premier, pour qu'en cas de combustion, le feu ne pût se communiquer d'un édifice à l'autre. Il y a, dans ce fait, une imprévoyance injustifiable de la part de la Compagnie, une négligence coupable dont elle doit, ce me semble, répondre des conséquences. L'incendie n'a pas été le résultat d'un *cas fortuit*, d'une *force majeure*. Si c'est un accident, c'est un accident que la Compagnie aurait dû prévoir. "Waste such as necessarily must be kept in such a lamp-room," dit le témoin Pennington," has been known to ignite spontaneously, particularly if oiled." Il me semble que le jugement dans la

cause de Mountain, dont est appel, devrait être confirmé. L'autre action, celle de Huston, est semblable à celle intentée par Mountain. L'enquête est la même excepté en ceci. Lay, le 5e témoin en la présente cause, dit que, depuis mars 1855 à mai 1857, il était l'agent de la Compagnie à la station de Stanfold où demeurait Huston, le Demandeur; que durant ce temps-là, il lui a souvent délivré des notes d'avis (advice notes) semblables au blanc, marqué B, produit en cette cause, que le Demandeur a dû lire les conditions imprimees au dos de ces lettres, parmi lesquelles conditions se trouve celle de non-responsabilité. Il dit aussi que le tarif des marchandises, marqué A, produit en cette cause, avait été affiché dans toutes les stations, entre autres, dans celle de Stanfold, et que tout individu pouvait le lire, et que le Demandeur a dû le lire. J'en vins à la même conclusion que dans la cause de Mountain.

AYLWIN, J., said that he concurred in the views expressed by His Honor the Chief-Justice, but he objected to the words "common law liability of a common carrier" which were to be found in the judgment of the court below.

Judgment of court below confirmed. (6 *J.*, p. 173.)

CARTIER and POMINVILLE, for Appellant.

ROBERT MCKAY, Counsel.

BETHUNE and DUNKIN, for Respondents.

PROCEDURE.—ASSUMPSIT.

SUPERIOR COURT, Sherbrooke, 26th October, 1856.

Coram DAY, J., MEREDITH, J., SHORT J.

INGHAM *vs.* KIRKPATRICK.

Held: That money paid to a contractor, in advance, on account of the consideration of a contract for building, cannot be recovered back by ordinary action of assumpsit.

This was an action for the recovery of the sum of £52. The action was in the ordinary form of an action of assumpsit, the declaration setting forth the common counts. The Defendant pleaded that the sum claimed by Plaintiff was paid to him, Defendant, as part of the consideration for the building of a house by Defendant for Plaintiff, but he did not allege that he had fulfilled the obligations undertaken by him. The evidence adduced by Plaintiff consisted of receipts signed by Defendant, by which it appeared that the money sought to be recovered had been paid in advance, as part of the considera-tion of the contract pleaded by Defendant. The fact was also established that Defendant had done very little of the work.

SANBORN, for Plaintiff, argued that the proof was sufficient

to entitle Plaintiff to judgment. The Defendant did not even allege that the work which he had undertaken to do had been performed. He had received advances in money from Plaintiff upon the faith of his fulfilling his contract. As he had failed to do so, Plaintiff had a right to recover back the sums advanced.

RITCHIE, for Defendant. The action of assumpsit is based upon a promise express or implied. In this case, no promise such as is alleged in the common counts in the declaration has been proved. The Defendant had undertaken by a written contract to build a house for Plaintiff. His liability towards Plaintiff was to do the work, not to repay the money advanced. The only action to which Plaintiff was entitled was an action of damages for non performance of the work.

Action dismissed. (3 *J.*, p. 282.)

SANBORN and BROOKS, Attorneys for Plaintiff.

RITCHIE, Attorney for Defendant.

PROMISSORY NOTE.—SOCIETY.

SUPERIOR COURT, Montreal, 31st May, 1859.

Coram BADGLEY, J.

BROWNING *vs.* THE BRITISH AMERICAN FRIENDLY SOCIETY.

Held: That the acceptance of a bill of exchange by the officer of a friendly society, if not within the scope of his regular duties as such officer, is, and unless specially authorized by the society, not binding upon it.

Plaintiff sued, as holder of a bill of exchange drawn by James H. Phillips, president and general manager of Defendant, in his individual name, upon David Hunter, secretary-treasurer of the same society, individually, and accepted by him as secretary-treasurer. Defendant pleaded a want of authority on the part of its officers to bind the society by transactions beyond the purposes of its creation, as defined by the act of incorporation, without special authorization from the board of direction, which in the present instance had not been given.

JUDGMENT: " The court, considering that Plaintiff hath not " established the material allegations of his declaration, and " that the acceptance fyled by Plaintiff and drawn by James " H. Phillips, individually, upon David Hunter, esquire, indivi- " dually, and accepted by David Hunter, as secretary-treasurer " of " The British American Friendly Society of Canada," the " Defendant was unauthorized, and did not make Defendant " liable therefore, doth dismiss the action." (3 *J.*, p. 306.)

BOVEY, for Plaintiff.

DOUTRE and DAOUST, for Defendant.

PROCEDURE.—SUMMONS.

SUPERIOR COURT, Montreal, 31st May, 1859.

Coram BADGLEY, J.

MACFARLANE *vs.* BELIVEAU.

Held: That a summons to appear " before *our Justices* of our Superior Court," is sufficient and available as a summons to appear before the *Court.* (1)

This was an exception *à la forme* to a writ of summons, by which Defendant was summoned " to be and appear before *our Justices* of our Superior Court; " Defendant contending, that the proper mode was to summon the party to appear before the *court*, and not before the *Justices.*

PER CURIAM: This case is one of some difficulty, for I find it was decided by this court, in the case of *Macfarlane* vs. *Delesdernier*, 4 *R. J. R. Q.*, p. 56, that such a writ as the present one was bad, but, in a case of Grant & Brown, decided in appeal, 6 L. C. Law Reports, p. 187, the chief-justice said: " I do not think that making the writ returnable before one or more of the judges of the Superior Court would vitiate the writ." It is true, that in the case last referred to, the writ was set aside, but not on the ground that the summons to appear before the judges of the court was bad, but because the writ, which was one in an action of ejectment, summoned the Defendant to appear (as under the old law) " in the hall " in the court house wherein are usually held the sittings of " of our said court." Now, am I to follow the judgment rendered by the Superior Court, or the opinion expressed in appeal. As the opinion thus expressed in appeal squares with my own view of the matter, I shall adopt it here, and I therefore dismiss the exception. (3 *J.*, p. 306.)

LAFLAMME and LAFLAMME, for Plaintiffs.

CARTIER, BERTHELOT and POMINVILLE, for Defendant.

PROCEDURE.—PARTIES EN CAUSE.

COUR SUPÉRIEURE, Montréal, 25 mai 1858.

Coram BERTHELOT, J.

HIP. MARTIN *vs.* ED. MARTIN.

Jugé: Que la résolution d'un acte ne peut être poursuivie sans mettre en cause toutes les parties à cet acte. (2)

(1) V. art. 48 C. P. C.

(2) V. art. 120, § 8, C. P. C.

Le 3 octobre 1854, Hip. Martin donne différentes propriétés à Toussaint Martin, son fils, à la charge d'une rente viagère, payable en grains, etc. Le 25 avril 1857, Toussaint Martin, le donataire, échange une partie (presque tout) de ce qu'il a reçu de son père avec Edouard Martin, son frère, qui se charge de toutes les obligations de Toussaint Martin envers son père. Hip. Martin (le père donateur) intervient à l'acte d'échange, et " déclare avoir l'échange pour agréable, l'approuve, confirme " et ratifie, *en autant que Edouard Martin remplira envers " lui toutes les mêmes obligations que Toussaint Martin était " tenu, en vertu de l'acte de donation consenti par lui au dit " Toussaint Martin, le 3 octobre 1854.*" Le 1er décembre 1858, Hip. Martin, le donateur, poursuit Edouard Martin (échangiste, non donataire), demandant la révocation de l'acte de donation du 3 octobre 1854, et la résolution de l'acte d'échange du 25 avril 1857, et concluant " à ce qu'il soit déclaré que par le jugement à intervenir Ed. Martin est déchu de tout droit à la propriété des terres et choses en question (les terres et choses " données le 3 octobre 1854) pour défaut d'accomplissement " de ses obligations et son ingratitude, etc."

Le Défendeur plaida par une défense en droit: 1° que l'ingratitude ne pouvait être cause de la résolution de la donation faite par le Demandeur à Toussaint Martin, le 3 octobre 1854, vu que d'après les allégations de la déclaration, il apparaissait que le Défendeur ne possédait pas en vertu de cet acte, mais en vertu de l'acte d'échange entre le Défendeur et Toussaint Martin; 2° qu'en supposant que l'action fût portée contre le donataire lui-même, le défaut de paiement des arrérages d'une rente viagère ne pouvait donner lieu à la résolution du contrat qui crée cette rente; 3° qu'en supposant que le Défendeur fût coupable du refus allégué de remplir les obligations de Toussaint Martin, contenues en l'acte du 3 octobre 1854 et assumées par le Défendeur dans l'acte d'échange du 25 avril 1857, la résolution de ces deux actes ne pouvait être poursuivie sans mettre en cause l'échangiste du Défendeur, savoir Toussaint Martin; que le but de l'action étant de remettre les choses dans l'état où elles étaient avant la donation, ce résultat ne pouvait être obtenu, quant au Défendeur, sans que la condamnation demandée ne rétablît en même temps les choses entre les deux échangistes dans l'acte du 25 avril 1857.

DOUTRE, pour le Défendeur, sur la troisième proposition, celle de la nécessité de mettre toutes les parties en cause, argua que, si la délégation par Toussaint Martin au Défendeur était parfaite, il pourrait y avoir du doute, pour savoir si le Défendeur ne devait pas être tenu, à l'égard du Demandeur, à toutes les conséquences du défaut d'accomplissement des charges par lui assumées, sauf pour lui à chercher son remède

ailleurs; mais que le doute s'évanouissait en présence d'une délégation aussi imparfaite que celle contenue dans l'acte d'échange. En réalité ce dernier acte ne contient qu'une indication de paiement. Le Demandeur déclare n'accepter le Défendeur, comme débiteur, qu'*en autant qu'il remplira les obligations de Toussaint Martin.* Donc il demeure créancier de Toussaint Martin, si le Défendeur ne remplit pas fidèlement ses obligations. Pour que la délégation soit parfaite, il faut que le premier obligé soit libéré. Delvincourt, t. 2, p. 567, note 3. En supposant que la délégation fût parfaite, comment parvenir au résultat demandé, c'est-à-dire, la résolution de l'échange, et remettre les parties dans l'état où elles étaient sans mettre en cause les deux échangistes? Le rôle des tribunaux, en déclarant un acte résolu, consiste à contraindre les parties à cet acte à défaire ce qu'elles ont fait et à se faire réciproquement les remboursements et prestations que l'équité les obligerait à remplir. On en a un exemple dans la résolution de la vente pour défaut de paiement, lorsqu'elle est prononcée entre les deux parties contractantes. Dans ce cas, le vendeur doit rembourser ce qu'il a reçu, compensation faite des fruits et revenus. Pothier, *Vente*, n° 469 ; Toullier, t. 6, n° 563 et suivant, 567 *in fine.* Dans tous les cas de rescision poursuivie contre des tiers acquéreurs pour dol, lésion, erreur, l'acquéreur originaire et le tiers détenteur doivent être et sont mis en cause. Bédarride, *Dol et fraude*, t. 1, n° 299 ; Duranton, t. 12, nos 564, 556 ; il en est ainsi de la résolution demandée en cette cause. Duranton, t. 8, n° 543 ; Duranton, t. 16, n° 361 ; Sirey, *Cassation*, t. 17 (1816, 11 mars), 2 partie ; Poncet, *Législation et procédure*, t. 1, p. 179 ; Décisions des tribunaux, Bas-Canada, t. 7, p. 66, *Patenaude* et *Lériger* ; 3 *R. J. R. Q.*, p. 167, *Mignier* et *Mignier* ; 6 *R. J. R. Q.*, p. 150, *Joseph* et *Brewster.*

LORANGER, pour le Demandeur, répondit que la délégation contenue en l'acte d'échange ayant personnellement obligé le Défendeur envers le Demandeur, ce dernier n'avait pas à s'inquiéter si son action créerait plus ou moins d'embarras au Défendeur ; que le Demandeur, ayant droit de s'adresser directement au Défendeur, en vertu de la délégation, n'était pas tenu de mettre Toussaint Martin en cause, qui s'y trouvait d'ailleurs, pour ce qui concernait le Demandeur, en la personne du débiteur délégué.

PER CURIAM : Si la défense en droit ne pouvait réussir qu'à la condition d'affirmer la seconde proposition énoncée par le Défendeur, savoir, que le défaut de paiement des arrérages d'une rente viagère n'est pas une cause de résolution de l'acte constitutif de la rente, la cour serait contrainte de débouter la défense en droit ; car, tout en reconnaissant que cette

proposition est conforme à l'art. 1978 du code Napoléon, il est constant qu'elle est repoussée par le droit ancien qui nous régit. Mais les autres propositions légales de la défense en droit suffisent, si elles sont affirmées, pour faire débouter l'action ; et la cour est d'opinion, pour les raisons développées dans les autorités citées par le Défendeur, 1° que l'ingratitude n'est une cause de résolution qu'à l'égard du donataire lui-même ; 2° que la résolution des deux actes mentionnés dans la déclaration ne pouvait être poursuivie sans mettre en cause les parties stipulant dans ces actes. En conséquence, la cour maintient la défense en droit et déboute l'action. (3 *J.*, p. 307.)

LORANGER et FRÈRES, pour le Demandeur.

DOUTRE et DAOUST, pour le Défendeur.

TOLL BRIDGE.—INFRINGEMENT OF PRIVILEGE.

SUPERIOR COURT, Montreal, 31st March, 1859.

Coram BADGLEY, Justice.

LEPROHON *vs.* GLOBENSKY, Tutor.

Held: That a conveying or crossing of persons, &c., over a river within the limits of another's exclusive right of ferriage and transport although done gratuitously, if it ultimately produces gain to the person working the unauthorized ferry or crossing, is a crossing for hire and gain within the meaning of the statute, and an infringement of the exclusive rights created thereunder.

This action was brought against Globensky, as tutor to a minor, proprietress of a seigniorial mill at St. Eustache, and who in the course of the action took up the instance, to recover damages for the infringement of an exclusive right of ferry held by Plaintiff, under the provincial statute, 10 et 11 Vict., ch. 99, and to obtain a judicial prohibition of such infringement for the future. Plaintiff was proprietor of a bridge from St. Eustache to Isle Jesus, with exclusive privilege of crossing persons, cattle and carriages for toll. By the act, a penalty was imposed upon any other person who should build a bridge, or work, or use a ferry for transport across the river, for hire, within a league above or below Plaintiff's bridge, of, in case of a bridge, three times the toll chargeable on Plaintiff's and, in case of a ferry, forty shillings for each person, animal or carriage, conveyed across the river for hire or gain. Defendant, in order to draw customers to her mill, on the St. Eustache side of the river, provided a boat and made no charge for bringing them over; and this practice continued from 1849 till 1853. Plaintiff complained of this as an inter-

ference with his rights. Defendant fyled a *défense en droit*, to the effect that Plaintiff had no action in damages, but that a penalty having been fixed by the act, he could only sue for its enforcement before the prescribed tribunal. Two exceptions were also pleaded, setting forth that Defendant had not contravened the statute, because no charge had been made for her ferry, and also that Plaintiff had suffered no damage by the existence of the ferry, since, if there had been no such convenience, those persons who had made use of it to come to her mill, would not have crossed Plaintiff's bridge, but would have taken their grist to another mill further up the river, where also free crossing was offered.

BADGLEY, J.: The ground of the demurrer has already been overruled in this court; and, in the 16th Louisiana Reports, is to be found a case, *Fenner* vs. *Watkins*, where a similar decision was given. The law, in fixing a penalty, provides a punishment for the public offence of infringing the law, but does not take away the common law right, to seek redress in damages for injury committed. Defendant's ferry disturbed Plaintiff's exclusive privilege, it being not more than half a league away, but it appears that, if the people had not been able to cross in Defendant's boat, they would have gone to Mr. Viger's mill, higher up the river over his bridge, as he too made no charge for crossing to those using his mill. The question is, could the proprietress of the St. Eustache seigniorial mill, by offering free carriage across, attract grist to her mill to the injury of the owner of the bridge; I think not. At common law, an action lies at the suit of the owner of a ferry or bridge, having exclusive privilege within certain limits, against one who erects any other ferry or bridge within those limits. This is a general principle of the text books, and cases sustain it; see in 6 B. and Cr. 703, a case of disturbance of ferry, by Defendant plying a boat from and to the same places from and to which Plaintiff's ferry-boat plied. So also it is applicable to a toll bridge with exclusive right. Where a person does anything injurious to such a right, the bridge owner has an action against him. In this case the exclusive right is granted by the legislature, and the point is, has Defendant contravened that right by crossing persons, &c., without charge, the act having declared that no person, etc., shall be conveyed or passed *for hire or gain?* This point has, to a certain extent, been ruled by our own local jurisprudence, in the year 1842, in the case of Lachapelle, who obtained judgment in his favor. He was owner of a bridge, with exclusive right of transport, and some persons, with the object of forming a crossing by which they secured certain advantages, sent down masses of ice against his piers, where they loged and made a crossing. However, it is no disturbance, if one having a boat for his own convenience

cross himself, or even lend his boat to his neighbour gratuitously, because the taking of toll for passage is essential to the establishment of a ferry. But, it is otherwise where the gratuitous passage is only a cover for gain, as in the case of *Fenner* vs. *Watkins* above. There Defendants were tavern-keepers, and carried across gratuitously all persons who stopped at their hotel; and, in that case, it was held that the profits which they made from such customers, enabled them to bear the expense of taking them over the river, and this obligation which the customers were under, when no ferriage was charged, to put up at Defendant's house, was as advantageous to the latter as the ferriage, and perhaps more so, and, consequently, equally injurious to Plaintiff. The principle of this judgment manifestly applies to the present case. It is established by the proof of record that Defendant passed over persons, animals and carriages, by a boat or *chaland* expressly kept for the purpose, true, without charge, but for the special benefit of her mill, and for the grinding of the grain conveyed by them, which would otherwise have been lost to Defendant, inasmuch as these grain owners on Isle Jésus would rather have gone to Viger's mill, a few miles further, where they were crossed without charge, than to Defendant's mill, paying bridge toll, notwithstanding the proximity of Defendant's mill, and its making better flour, worth 1s. per quintal over the flour made at the other mills. Defendant charged nothing for her ferry, but still she made gain by it. It was to her advantage to offer this inducement, and she profited pecuniarily by it, though she took no pay for the mere ferry. Plaintiff must have judgment. As to the damages, they will be only nominal, £5, as none are specially proved, but a prohibition will issue against Defendant, forbidding her to continue the ferry.

" La cour condamne les Défendeurs par reprise d'instance à payer aux Demandeurs par reprise d'instance la somme de £5, pour dommages et intérêts causés aux Demandeurs par reprise d'instance, pour les causes mentionnées en la declaration filée en cette cause, pour avoir gardé ou fait garder un bac ou chaland (pour leur profit) pour traverser des personnes, bestiaux et voitures, sur la rivière Jésus, au-dessus du pont des Demandeurs par reprise d'instance, mais dans les limites du privilège de ces derniers, et aussi, en ayant pratiqué et fait pratiquer, pour leur profit, illégalement, au moyen de ce bac ou chaland, des voies de passage et traverse pour le transport des personnes, bestiaux et voitures, à travers la rivière Jésus, au mépris du statut provincial 10 et 11 Victoria, c. 99, et des droits acquis des Demandeurs par reprise d'instance, et pour les priver, depuis 1849 à l'année 1853, des droits et profits de péage du pont, tel que plus amplement mentionné et détaillé

dans la déclaration du Demandeur. Et la cour, au désir des conclusions du Demandeur, fait, par ces présentes, défense aux Défendeurs par reprise d'instance, de recevoir ou de tenir et maintenir le dit bac ou chaland, ou aucune autre voiture d'eau pour, au moyen d'iceux, pratiquer pour leur profit, aucune voie de passage ou traverse des personnes, bestiaux et voitures, dans les limites du privilège des Demandeurs par reprise d'instance." (3 *J.*, p. 310.)

LAFRENAYE and PAPIN, for Plaintiff.

CHERRIER, DORION and DORION, for Defendant.

Authorities cited by Plaintiff: Vide 7 *Pickering's Reports*, 344, the case of the *Charles River Bridge Company*, and *the Warren Bridge Company*; 5th volume *Peters*, 428; *American Jurist* for July 1831, vol. 6, page 86, 184; *Pascal Persillier-Lachapelle* vs. *Lessort et al.*, Montreal, April, 1842; *Sed contra*, *Motz* Appellant, and *Rouleau et al.*, Respondents, November, 1848.

PONT DE PEAGE.—DOMMAGES.

EN APPEL DE LA COUR SUPÉRIEURE, DISTRICT DE MONTRÉAL.
Montréal, 1er mars 1862.

Coram Sir L. H. LAFONTAINE, Bart, C. J., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET (C), A. J.

GLOBENSKY et uxor *(Défendeurs en Cour Inférieure)*, Appellants, *et* LUKIN et al. *(Demandeurs en Cour Inférieure)*, Intimés.

Jugé : Que le propriétaire d'un moulin qui a pratiqué ou fait pratiquer au moyen de bacs ou chalands des voies de passage et traverse dans les limites du privilège d'un pont de péage, pour y traverser les gens à son moulin gratuitement; mais dans la vue de se procurer des gains par la monture de leurs grains, est passible des dommages-intérêts envers le propriétaire de ce pont à raison de la perte de ses profits, qui lui sont ainsi enlevés indirectement.

Cette demande étant de la même nature que celle déjà rapportée ci-dessus p. 19, il est inutile d'en exposer ici les circonstances. Il suffit d'observer que, par leurs conclusions, les Intimés, néanmoins, ne demandaient pas à ce que défense fût faite aux Appelants de recevoir ou de tenir aucune voiture d'eau, pour, au moyen d'icelle, pratiquer, pour leur profit et d'une manière indirecte, aucune voie de passage ou traverse des personnes, bestiaux et voitures, dans les limites du privilège des Intimés, ces derniers ayant simplement conclu aux dommages-intérêts. Cet action fut contestée par une dénégation générale. Sur la preuve faite de part et d'autre, la Cour Supérieure, à Montréal, ayant condamné les Appelants à payer £35, de dommages-intérêts, ils interjetèrent appel, et, par leur factum, ils ont ainsi exposé leur cause : " Le jugement de

la Cour Inférieure condamne les Appelants à payer aux Intimés la somme de trente-cinq livres, pour dommages qu'ils réclamèrent, pour avoir gardé ou fait garder un bac ou chaland, pour leur profit, pour traverser des personnes, bestiaux et voitures, sur la rivière Jésus, et aussi en ayant pratiqué, ou fait pratiquer, pour leur profit, illégalement, des voies de passage, pour le transport des personnes, bestiaux et voitures, à travers la rivière, au mépris du statut provincial, 10 et 11 Vic., ch. 99, qui établit un privilège pour la construction d'un pont, en excluant toute concurrence dans les termes suivants : Sec. 9. "*And if any person or persons shall, at any time, for hire "or gain, pass or convey any person or persons, cattle or "carriages, cross the said river, within the limits aforesaid, "such offender or offenders shall, for each carriage, or person, "or animal so carried across, forfeit and pay a sum not ex- "ceeding forty shillings currency* :" Sec. 13 du même statut déclare ce qui suit : "*And be it enacted, the penalties hereby in- "flicted shall, upon proof of the offence, respectively, before "any one or more Justices of the Peace for the said District of "Montreal, either by the confession of the offender, or by the "oath of one or more credible witness or witnesses (which oath "such Justice is hereby empowered and required to adminis- "ter), be levied, by distress and sale of the goods and chattels "of such offender, by warrant signed by such Justice or Jus- "tices of the Peace, and one half of such penalties, respective- "ly, when paid and levied, shall belong to Her Majesty, and "the other half, to the person suing for the same.*" Le statut conférant le privilège aux Intimés ne contient aucune autre disposition relativement à la violation du privilège. L'action des Intimés était une simple action de dommage, pour la perte à eux occasionnée par les Appelants, de 1853 à 1859, par l'emploi d'un bac pour traverser les individus qui apportaient du grain à leur moulin seigneurial, situé à plus d'un mille au-dessus du pont. Une première action avait été intentée en 1853, pour faire constater le droit des Demandeurs et, par les conclusions, les Intimés demandaient que défense fut faite aux Appelants de traverser. Le droit des Intimés fut reconnu par le jugement qui fut rendu en 1859. Voir ci-dessus, p. 21. Depuis cette époque, les Appelants ont cessé de traverser. Les Intimés, néanmoins, non contents de la condamnation nominale qu'ils avaient obtenue (quarante schellings), ont jugé à propos d'intenter une action, pour réclamer les dommages qu'ils prétendaient avoir soufferts durant l'instance, et c'est sur cette action qu'est intervenu le jugement dont est appel. Les Appelants s'appuient principalement sur l'absence de toute prohibition réclamée dans les conclusions de la présente action, question déjà déterminée par le premier jugement; celle dont il

s'agit est une simple action en dommage. La Cour Inférieure, lors de la première cause, renvoya une défense en droit que les Appelants avaient alors formulée, en alléguant que le statut n'indiquait qu'un seul remède, une pénalité recouvrable devant les juges de paix, et que toute autre action n'était pas recevable. On conçoit que la Cour Inférieure devait rejeter cette défense en droit, attendu qu'il y avait plus qu'une action en dommages ; c'était plutôt une action négatoire tendant à faire affirmer un privilège à l'exclusion des Défendeurs. Aucun de ces caractères ne se rencontre dans la présente demande des Intimés, et leur remède ne peut être autre que celui indiqué par le statut, la pénalité poursuivie devant le juge de paix. Ces chartes ou privilèges octroyés par statut doivent être strictement interprétés. Si la législature n'a jugé à propos de les garantir que par des amendes, lorsqu'on empiéterait sur leurs limites, on ne peut pas invoquer d'autres remèdes. Car, sans la lettre du statut pour la restreindre, la liberté qu'a tout homme de se servir de la rivière navigable comme d'un grand chemin subsiste toujours. La seule garantie de ce privilège, la seule condition attachée à sa violation est l'amende. Il y a cependant, dans cette cause, quelque chose de plus favorable encore aux Appelants. Il est établi par la preuve que, dès que le premier jugement fut prononcé, ils ont cessé de traverser. Il n'y a aucune malice, aucun *trespass*, c'était de bonne foi, pensant exercer leur droit. Et c'est durant le litige seulement qu'ils ont continué la traverse. Le seul motif qui aurait pu justifier aucune demande de la part des Intimés et la seule cause légale admissible pour leur permettre d'intenter une action contre les Appelants, est la perte réelle et certaine qu'ils auraient pu éprouver. Or il est évident, d'après la preuve qu'ils n'en ont subi aucune, tous les témoins produits par les Intimés déclarent qu'aucun de ceux qui traversaient au moulin des Appelants n'aurait passé sur le pont des Intimés, qu'ainsi ces derniers n'ont effectivement rien perdu, ce qui, d'ailleurs, appert par le premier jugement ; car c'est le motif qui détermina la Cour Supérieure à n'accorder que quarante schellings de dommages lors du premier jugement. Les Appelants invoquent ce premier jugement comme un précédent, découlant du principe que, pour réclamer des dommages, il faut justifier d'une perte. Il n'y a aucune preuve dans le dossier pour constater que les Appelants aient enlevé aucun profit aux Intimés et, par suite, ceux-ci n'ont pu éprouver aucune perte. Les conditions voulues pour leur faire obtenir une condamnation en réparation manquent. " Les dommages et intérêts ne doivent représenter que le préjudice qui est la suite immédiate et directe du fait. En matière de délit, comme lorsqu'il s'agit de l'inexécution des obligations contractuelles, les dommages et intérêts

ne peuvent être que la représentation du préjudice éprouvé et du gain dont on a été privé, *lucrum cessans et damnum emergens.*" Dans l'absence d'une preuve directe de préjudice souffert, la Cour Inférieure ne pouvait prononcer aucune condamnation contre les Appelants. Si la loi avait été violée, sans perte de profit pour les Intimés, ils pouvaient exercer la pénalité et c'était, dans les circonstances, le seul remède que la loi leur accordait." Les Intimés, par leur factum, ont exposé leur cause comme suit : Les Intimés ont prouvé des dommages excédant de beaucoup le montant accordé par le jugement dont est appel, et pour établir leur droit d'action, ils réfèrent aux autorités suivants : 16 Louisiana Reports, *Fenner* vs. *Watkins* ; 6 B. and Cr., p. 703 ; 7 Pickering's Reports, 344 ; 5 Peters, 428 ; 6 vol. of the *Am. Jurist.*, p. 86 ; *Lachapelle* vs. *Lessort*, April 1832 ; *Leprohon* vs. *Globensky*, *supra* p. 19. A l'argumentation de la cause, en appel, LAFRENAYE, pour les Intimés, prétendit que, nonobstant l'absence de toute prohibition réclamée dans les conclusions de l'action, les Intimés n'étaient aucunement astreints à n'exercer qu'un seul remède, celui indiqué par le statut, savoir : une action recevable devant les juges de paix, et que la loi commune, qui leur donnait droit d'action pour dommages-intérêts, n'avait pas été abrogée. Que cette dernière action était constamment pratiquée en Angleterre dans des cas analogues, comme l'on peut s'en convaincre par les remarques judicieuses faites par les honorables Juges qui avaient renvoyé la défense en droit en la première action, sur un tout autre principe que celui que leur a attribué les Appelants dans leur factum. (1) Que les

(1) LEPROHON *vs.* GLOBENSKY, SUPERIOR COURT, Montreal, 28 June, 1854. Coram DAY, J., SMITH, J., MONDELET, J. PER CURIAM : DAY, J. This was an action involving a point of some interest. The Plaintiff was the proprietor of an old bridge, across river Jésus, the privilege of building which had been granted him by act of Parliament. The Defendant had been in the habit of ferrying people across the river, near the bridge, to convey them to a mill owned by him on the other side. The Plaintiff's action substantially set out that the ferry was within the limits over which the law gave him the exclusive right of levying tolls, and asked for damages, in consequence of Defendant's invasion of the privilege. The Defendant pleaded a *défense en droit*; setting up that there was no such action in law accompanying the privilege ; that they created a special prohibition and a remedy for its infringement, and that where the statute itself provided a remedy for its violation, no action at common law could lie. This general proposition was true, where a specific remedy was given, one must abide by it ; the books were full upon this subject and it was needless to waste time upon it. There was something, however, in this case, which took it out of the general rule. The 10 and 11 Vic., ch. 99, under which the bridge was constructed, after giving the authority to build the bridge, in the ninth section, contained prohibitory enactments, by the terms of which, after the completion of the bridge, no person or persons were to use any ferry for the carriage of any person, cattle or carriage whatsoever for hire across the said river Jésus at a distance of one league above the bridge and below the same, and that, if any such should offend against these, for each carriage, person or animal so carried across a forfeit not ex-

Appelants, en traversant leurs censitaires et autres personnes gratuitement, mais dans le but évident de se procurer un *gain* indirectement, au préjudice des Intimés, ont évidemment privé ces derniers des profits que la loi du pays leur a garantis, et ont violé les dispositions du statut qui contemple non seulement le cas où une traverse illicite est pratiquée *for hire* mais encore *for gain* en façon quelconque. Que les circonstances de cette cause sont bien différentes de celle de Motz, Appelant, et Rouleau, Intimé, où il s'agissait d'un pont libre, *free bridge*, au moyen duquel Rouleau avait pratiqué une traverse dans les limites du privilège du Pont de Motz ; mais non pas dans le but de se procurer aucun gain même indirectement. (1)

AYLWIN, J., who dissented, now said that it had been urged that the 40s. of the penalty was the only remedy which

ceding 40s. should be paid. By a following clause, a provision was made for the recovery of the penalty before a justice of the Peace for the district of Montreal and one half of the penalty when paid was to belong to the Queen, and the other half to the person suing for the same. We are of opinion that the remedy by action at law lies notwithstanding. The remedy here given is not in favor of the party in whose favor the privilege was erected ; by it he has no means of indemnification. The penalty is to the Informant and the Queen. The distinction in the English law is thus given : Where the penalty is a specific remedy given to the injured party, there is no action at common law ; but if it be merely to any Informant, there is an action to the party that suffers. In the case of *Bedford* vs. *Hunt* cited in Terrwhitt's Reports, an action brought by an author for the infringement of his copyright, the point was settled as above, there being no remedy to him individually, it was decided that he had an action at common law. The *défense en droit* is dismissed with costs. The other point raised was a minor one.

MR. JUSTICE SMITH : Even if the clause of the statute had given the penalty to the proprietor, the latter would have had an action at common law for any injury he might have received. In this case, however, the reason was stronger.

MR. JUSTICE MONDELET would go even further than his learned *confrères*. He would give him not an action at common law, for there was none such ; but by a certain rule of justice would grant him his demand to the extent of the injury received *d'après la mesure de son droit*. The penalty was not indemnification.

(1) MOTZ, Appellant, *and* ROULEAU, Respondent, 10th November, 1848, Coram ROLLAND, C. J., MONDELET, J., GAIRDNER, J., SMITH, J. The appeal in this cause was from a judgment rendered in the court below dismissing an action of damages brought for having built a temporary bridge within the limits pointed out by the statute 58 Geo. III, under which a toll bridge had been erected by the Plaintiff. The statute contains no penalty for building a bridge within the limits, the question therefore was whether parties could build a *free bridge* or not. His Honor the Chief Justice Rolland, in giving the decision of the majority of the court, stated that the party who brought this action must shew that the public had no right to pass the river between the limits pointed out. There was nothing in the act obliging the inhabitants to go by the Plaintiff's bridge. The case of Lachapelle's bridge had been quoted. He found he had occurred in that judgment, but chiefly on the ground that damages had been done to the bridge by the ice bridge made there. Had the inhabitants only followed out the old customs of the country in forming ice bridges, and done no damage by the ice bridge, he would have hesitated to concur. Judgment for Defendant in the court below confirmed. Judges Gairdner and Smith dissenting.

Plaintiff had, if the law had been contravened. He thought on that point, however, it was clear that besides the penalty, there was a good claim for damage on the part of the owner of the privilege, if the privilege had been trespassed on. There had been a preceding action to obtain a kind of inhibition against this ferry, and on that also the Respondents had obtained a judgment ; but though he should had it been appealed against, have been disposed to reverse that judgment, the court then had nothing to do with. The object of the Legislature, in granting this privilege, was to enable travellers to cross the river and reach the high road with more facility, and the persons who were to build the bridge were, moreover, and for the same purpose, authorized to obtain a piece of land to connect the bridge and the road, and then the statute declared that after the bridge and works should be finished, no other bridge or ferry should be permitted to be used for hire or gain within a league of the bridge, providing, however, that nothing in the act should prevent persons from using the fords of the river, or passing in canoes or other boats without hire or gain. It might be remarked that the terms of the statute applied particularly to persons and animals, and said nothing about grain. Another clause of the statute reserved the rights of the Crown and of all other persons, except in so far as they were expressly infringed on by the act, that is to say, so far as concerned the right to ferry for hire or gain. The privilege thus accorded was the case of a contract between the grantee and the legislature. The former was to make and keep up the bridge, and the latter gave him the exclusive right to receive tolls from persons who crossed. But the owner of the bridge had no right to tolls or damages from a person who chose to ferry himself and family on his way to church or market, and the claim which the Respondent now sought to enforce was one oppressive in the extreme. He said in short that a man who found himself on the bank opposite this mill would have to go around to his bridge, pay toll and then go up the other bank, and return the same way, when he might go directly across. The Legislature never intended that. The bridge owner might as well pretend to claim damages from people who crossed on the ice. Authorities from the decisions in Louisiana had been cited, where tavernkeepers had been held for damages when they had ferried passengers to and from their houses without charge, within the limits of a bridge's-owner privilege. He could not admit the correctness of such decisions, and thought that this action could only succeed in the event of the Plaintiff establishing that, by the act complained of, he has been deprived of tolls which he otherwise would necessarily have received from

people who must have traversed his bridge, if they had not left it on one side to go over the ferry. There was a case at Quebec of *Motz* vs. *Rouleau* which, he thought, threw some light on this case, though it involved so many collateral points, which might have influenced the court, that he would not cite it as an authority. Another case, however, had been mentioned, which was that of the rival bridges at Boston, a case which did honour to the American Judiciary, and the report of which contained more learning respecting ferries and bridges than all the English books put together. Reference to that case would show that the principle universally conceded was that, to sustain such an action as this, it was necessary to make out that a fraud was perpetrated upon the owner of the bridge, by depriving him of tolls which he would otherwise have inevitably received. He must make out this allegation : " You convey parties across the river to get their grain ground, who if not thus ferried over, must have passed by the way my bridge." The judgment below would have the effect, now that the right of *banalité* had been abolished, of reaffirming it, in the most odious shape in favour of Viger's mill, where they might charge what they pleased for grinding, unless people chose to pay the toll for crossing the bridge to reach the other mill. He would have been disposed to dismiss the action on demurrer, and was now in favour of reversing the judgment below.

MONDELET, J., gave the judgment of the court, affirming the one rendered below. All he need say was that the law did not permit that to be done indirectly which could not be done directly and Appellants, therefore, could not be allowed to make a profit upon ferrying, though the price was included in the charge for grinding.

Judgment of the court below confirmed. (6 *J.*, p. 145.)

LAFLAMME, LAFLAMME and DALY, for Appellants.

LAFRENAYE, for Respondent.

INDIAN LANDS.

SUPERIOR COURT, Montreal, 22nd March, 1856.

Coram DAY, J., SMITH, J., (C.) MONDELET, J.

THE COMMISSIONER OF INDIAN LANDS FOR LOWER CANADA *vs.* PAYANT DIT ST. ONGE, et PAYANT DIT ST. ONGE (Plaintiff en garantie) *vs.* ON8ANORON (Defendant en garantie).

Held: 1° That Indians have not by law any right or title by virtue whereof they can sell and dispose of the wood growing upon their lands, set apart and appropriated to and for the use of the tribe or body of Indians therein residing.

2° That such wood is held in trust by the commissioner of Indian lands for Lower Canada.

This was an action *en saisie-revendication* brought by Plaintiff in the principal demand, for the recovery of twelve cords and upwards of fire-wood of the value of £10, cut, felled and carried away by Defendant in the principal demand in November, 1854, from and upon the unconceded lands of the seigniory of Sault St. Louis, which, for more than 20 years, has been set apart and appropriated to and for the use of the tribe or body of Indians therein residing and as such is vested in principal Plaintiff. Besides the value of the wood, principal Plaintiff claimed £50 for damages. Before answering this demand, principal Defendant took out an action *en garantie* against the Indian On8anoron with whom he had made a contract for the wood, alleging: "Que, par acte reçu à St-" Isidore, devant Langevin et son confrère, notaires, le 18 " décembre 1854, le Demandeur et le Défendeur convinrent " ensemble et déclarèrent ce qui suit, savoir : que le Défendeur " avait donné, le 1er novembre dernier, au Demandeur, un " morceau de terre d'environ un demi-arpent en superficie, " sur sa terre qu'il occupait alors dans le Sault St-Louis, si-" tuée au côté sud-est du chemin de fer de Montréal et New-" York, à nettoyer et faire la terre du demi-arpent en super-" ficie, au râteau (les souches exceptées), et livrable au prin-" temps prochain, pour être ensemencées, ce à quoi le Deman-" deur consentit et s'obligea par le dit acte, et pour toute " indemnité, de la part du Défendeur, envers le Demandeur, ce " dernier enlèverait dedans le morceau de terre tout le bois " qui s'y trouvait et en disposerait comme bon lui semblerait ; " tel fut expressément convenu." The Defendant *en garantie*, having appeared, took up the *fait et cause* of principal Defendant and pleaded as follows ; que le Défendeur en garantie a été, pour plus de cinq ans, propriétaire en possession, et a joui, pour son propre usage et avantage, et cela d'une manière distincte, des autres terres formant partie des terres qui sont

sous le contrôle du Demandeur principal, d'un certain lot de terre situé dans la seigneurie du Sault St-Louis au côté sud-est du chemin de fer de Montréal et New-York ; lequel lot de terre est encore occupé par le Défendeur en garantie ; qu'il en était ainsi en possession, le 1er novembre dernier, ainsi que du bois qui avait crû sur ce lot de terre ; que, ce jour-là, il a permis au Défendeur principal d'enlever du bois qui se trouvait sur le lot, et de le convertir à son propre usage, ainsi qu'il a été convenu plus tard, par acte fait le 18 décembre 1854, devant J. F. Langevin et son confrère, notaires ; que, par les us et coutumes suivis dans la tribu indienne du Sault St-Louis, le Défendeur en garantie avait droit de jouir du dit lot de terre, et de convertir à son propre usage le bois qui avait crû sur ce lot ; que le Défendeur principal, qui avait acquis le bois du Défendeur en garantie, n'en pouvait être, en aucune façon quelconque, dépossédé par le Demandeur principal, et qu'ainsi la saisie de partie de ce bois a été pratiquée à tort, et le Demandeur principal ne peut revendiquer la propriété du bois saisi.

To this plea, principal Plaintiff answered as follows : That even if Defendant *en garantie* did occupy the land mentioned, which Plaintiff denies, yet the occupation thereof or the possession thereof, under the customary indian title, could confer no right on the occupant to sell and dispose of the wood thereon, or any part thereof ; that the whole of the lands of said seigniory are held in trust by Plaintiff, for the benefit of the whole tribe of Indians therein residing, and under the local regulations of the chiefs of the tribe, duly appointed by competent authority ; that the right to take wood from off said lands, by said regulations and by law, extends only to the taking of such wood as may be required for the individual uses of the Indians residing therein, and confers on no party the right to sell and dispose of the same, and Plaintiff specially denies that Defendant *en garantie* had any legal right to sell and dispose of the wood seized ; that both Defendant and Defendant *en garantie* were well aware of these facts, yet, contriving to despoil said property of the wood growing thereon, to the loss and injury of the community of Indians for whom Plaintiff holds said lands in trust, Defendant, with the connivance of Defendant *en garantie*, took the wood from off the lands of said seigniory, and removed the same out of the possession of Plaintiff, and, to give a colour to said unlawful act, the agreement fyled by Defendant *en garantie* was afterwards drawn up.

The following admissions were agreed upon by parties : 1° that Plaintiff is vested with the lands of the seigniory of Sault St-Louis, in trust for the whole tribe of Indians

therein residing, as provided for in the statute in that behalf, and that the land from which the wood seized was cut and carried off was within the limits of said seigniory, and that principal Defendant is not of indian blood; 2° that the Indians residing in said seigniory of which Defendant *en garantie* is one, have certain rights of property, to wit: the power to enter upon portions of the uncleared lands of said seigniory, for the purpose of clearing and cultivating the same for their own use and profit; 3° that all Indians residing in said seigniory have the right to cut whatever wood they may require for fire or other purposes for their own use; 4° that the possession or occupation of any portion of land in said seigniory, by any individual Indian, gives him right of property therein as against any other Indians; 5° that Defendant *en garantie* had the common indian right to the land from which the wood in question in this cause was cut; 6° that the question of the right of Indians to sell wood, off the lands of said seigniory, has agitated the community of Indians for a considerable period, and that the chiefs thereof had warned the community not to traffic in wood, but Defendants do not admit that the chief had any right to forbid the sale of wood so cut as aforesaid, and neither Defendant nor Defendant *en garantie* plead ignorance that such traffic was forbidden by the chiefs; but, on the contrary, said parties were well aware of the traffic being forbidden as aforesaid. That the wood seized has grown upon the lot of ground in question, that is to say, the lot of ground described in the plea fyled by Defendant *en garantie*, which lot of ground was, at the time of the seizure and the time of the sale made by Defendant *en garantie*, to the principal Defendant of the wood in question, in the occupation of Defendant *en garantie*, in virtue of the right of property belonging to Indians and that it is in virtue of the agreement and bargain made between Defendant and Defendant *en garantie*, according to the sale and permission made and given by the latter to the former, that Defendant has cut the wood or caused the wood to be cut and carried off. Plaintiff does not admit, however, the right of Defendant *en garantie* to sell the wood aforesaid, leaving to the court the appreciation of that right.

" THE COURT, considering that Plaintiff hath established, by evidence, the material allegations of his declaration, and that Defendant *en garantie*, Saro On8anoron, who hath taken the *fait et cause* of Defendant, Louis Payant dit St. Onge, had not, by law any right or title, by virtue whereof, he could sell and dispose of the wood in this cause leased to him, Payant dit St. Onge, and that Payant dit St. Onge did not, by reason

of the agreement dated the eighteenth day of December, 1854, acquired any right to cut the said wood and to remove thence the same in manner and form as in and by the said agreement and by the exception of Defendant *en garantie* is set forth, dismissing said exception, and adjudging upon the merits of the principal demand; doth declare the attachment or *saisie-revendication* of about twelve cords of fire wood good and valid, and doth declare the same to be the property of Plaintiff, in his said capacity, and it is ordered that the said twelve cords of fire wood be delivered up and restored to Plaintiff, in his said capacity; and the court adjudging upon the *demande en garantie*: it is considered and adjudged that Defendant *en garantie*, Saro On8anoron, do guarantee, indemnify and hold harmless principal Defendant and Plaintiff *en garantie*, Payant dit St. Onge, from the condemnation herein pronounced against him." (3 *J.*, p. 313.)

DUNLOP, Attorney for principal Plaintiff.

LORANGER and POMINVILLE, Attorneys for principal Defendant and Plaintiff *en garantie*.

COURSOL, Attorney for Defendant *en garantie*.

SECURITY, BOUND IN APPEAL.—INDIAN.

COURT OF QUEEN'S BENCH, IN APPEAL,
Montreal, 9th June, 1859.

Before SIR L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

NIANENTSIASA, Appellant, *and* AKWIRENTE et al., Respondents.

Held: That the security bond, giver in appeal by Indians, is valid, inasmuch as, in the present case, the Indians who became securities were, as appeared by the affidavits, in possession, as proprietors, according to the indian customary law, of certain real estate situated and lying within the tract of land appropriated to the uses of the tribe to which they belonged. (1)

Respondents having made a motion to set aside the security given by Appellant (which security consisted of two Indians, Ignace Kaneratahere and Thomas Tahantison), a rule was issued, in the following words: "It is moved, on the part of Respondents, inasmuch as Appellant has not given good and sufficient security, in the manner required by law, to entitle him to the present appeal, and, inasmuch as the security by Appellant given is insufficient, the sureties in the security bond mentioned being valueless, and not

(1) V. art. 1938, 1939, 1940 et 1962 C. C.

worth the amount in which they justified, that the security given by Appellant, upon the present appeal, be declared insufficient, and null and void, and this appeal dismissed, unless cause to the contrary be shown on the 30th April instant :" " It is ordered that Appellant do shew cause to the contrary, on Saturday, the thirtieth day of April instant, sitting the court." Respondents fyled, in support of their rule, four affidavits to establish the insolvency of the securities. On the part of Appellant, four counter affidavits were produced in which it is stated : " que Thomas Tahantison est propriétaire et en possession de l'immeuble décrit en l'acte de donation, en date du 31 mars 1859, Lepailleur, N. P., depuis environ cinq ans, et qu'il a continué à l'être jusqu'à ce jour sans interruption. Il arrive souvent que les sauvages, dans l'étendue de la seigneurie du Sault St-Louis, possèdent des terres et en sont réputés et en sont réellement propriétaires sans avoir de titre devant notaires, ni par écrit sous seing privé. La moitié indivise de l'immeuble décrit à l'acte de donation susmentionné vaudrait pour des blancs, au moins quatre cent piastres. Sur la dite moitié indivise de l'immeuble appartenant à Thomas Tahantison, il y a une maison neuve qu'il a construite l'automne dernier, et une écurie. C'est une maison de vingt pieds carrés couverte en bardeaux. L'écurie est couverte en planche et bien bonne. Je sais que Ignace Kaneratahere possède un emplacement situé au village du Sault St-Louis, sur lequel il y a une maison en pierre à deux étages, dans laquelle il réside, et qui vaut au moins huit cents piastres. Il possède cet emplacement depuis que j'ai l'âge de connaissance, comme propriétaire, une terre d'à peu près quatre-vingts arpents en superficie, dans la seigneurie du Sault St-Louis, près de la paroisse St-Isidore, valant à peu près six cents piastres ; je sais qu'il possède aussi comme propriétaire trois isles sur lesquelles il cultive du foin, dans les limites de la dite seigneurie, et cela depuis plus de dix ans ; ces trois isles peuvent valoir cent piastres. Ignace Kaneratahere tient maison avec sa famille, et possède un ménage aussi bien qu'en ont les sauvages à l'aise ; je ne lui connais pas de dettes, et je n'ai pas connaissance qu'il ait été poursuivi en justice." The appeal bond had been given in December, 1858. The deed of gift fyled by the Appellant was made and passed on the 31st March, 1859.

Carter, for Respondents, contended that Indians could not hold, in their own name, immoveable property situated within the limits of such tracts of land as were occupied by them in this province, and cited the following authorities : 13 et 14 Vic., ch. 42, sect. 1, Indian lands vested in a commissioner ; sect. 2, All suits to be brought by or against commissioner ;

sect. 3, commissioner has power to concede, lease or charge any such lands; sect. 4, Rights of individual Indians, as *possessor* or *occupant*, preserved; No. 997, The commissioner of Indian lands for Lower Canada *vs.* Louis Payant dit St. Onge, and On8anoron, Defendant *en garantie*, under this statute, *Justices* Day, Smith, and Mondelet, on 23rd March, 1855, rendered judgment sustaining a *revendication* of wood cut in the seigniory in question. Referred to 7th head of admissions fyled, establishing that ten cords of the wood had been cut on land *in the occupation* of Defendant *en garantie*. The judgment declares he had no right or title, by virtue whereof he could sell the wood, and *Carter* for Respondent, contended that it sustains the proposition that the lands, in Sault St. Louis, and the right of property are vested in the commissioner. Rev. Statute, p. 573; 17 Geo. III, ch. 7, s. 3, Prohibits persons living in any Indian village without a license; Rev. Statute, p. 574; 3 & 4 Vic., ch. 44, sec. 2. Governor may order any person resident in Indian village to remove therefrom, under a penalty and imprisonment. The rule taken by the Respondents was discharged.

"La cour rejette la dite motion." (3 *J.*, p. 316.)

DOUTRE et DAOUST, Attorneys for Appellant.

CARTER, Attorney for Respondent.

DOMMAGES PAR ASSEMBLEE TUMULTUEUSE.—RIOT.

COUR DU BANC DE LA REINE, Montréal, 3 septembre 1860.

Coram SIR L. H. LAFONTAINE, Bart, J. C., AYLWIN, J., DUVAL, J., MONDELET, J., et BRUNEAU, J.

NIANENTSIASA (*Demandeur en Cour Inférieure*), Appelant, AKWIRENTE et al. (*Défendeurs en Cour Inférieure*), Intimés.

Jugé: Que la présence des Défendeurs, au sein d'une assemblée tumultueuse, résultat d'un complot, les rend responsables des dommages causés par cette assemblée, lors même qu'ils n'auraient pas activement participé dans les voies de fait. (1)

L'Appelant alléguait dans sa déclaration: "Que, le premier de février 1856, et longtemps avant, le Demandeur était propriétaire et en possession d'une maison et dépendances, dans la seigneurie des sauvages du Sault Saint-Louis, ainsi que d'effets mobiliers placés dans la dite maison et dépendances, lesquelles il occupait avec sa femme et ses enfants; que le dit jour, les Défendeurs conspirant ensemble, dans le but de rui-

(1) V. art. 1053 C. C.

ner le Demandeur et sa famille, et ce avec d'autres individus inconnus au Demandeur, auraient illégalement et malicieusement chassé de la dite maison le Demandeur et sa famille et mis sur le carreau, brisé et détruit ou enlevé les effets mobiliers du Demandeur et auraient livré ce dernier et sa famille, sans abri, aux intempéries de la saison la plus rigoureuse de l'année ; et qu'après avoir ainsi chassé le Demandeur et sa famille, les dits Défendeurs auraient, là et alors, renversé, démoli et détruit la maison du Demandeur, en causant par telles voies de fait, au Demandeur des dommages considérables, d'au moins cent livres."

Les Défendeurs plaidaient qu'ils n'avaient causé aucuns dommages au Demandeur ; que, si ce dernier en avait souffert aucuns, ils n'avaient été occasionnés par aucune conspiration, concert ou connivence des Défendeurs.

Le 28 octobre 1858, l'action était déboutée, sur le motif que le Demandeur n'avait pas prouvé les allégués essentiels de sa déclaration.

MONDELET, J., *dissentiens*: L'acte de ceux qui ont pris part à cette démolition est des plus répréhensibles, et il conviendrait de bien punir de ceux qui en ont été coupables. Mais, ici, il n'y a aucune preuve quelconque, par deux témoins au moins, que les Défendeurs ont pris part à cette démolition. Il est, au contraire, établi que les Défendeurs étaient à une certaine distance. Plusieurs des témoins des Défendeurs jurent positivement que ces derniers n'ont aucunement pris part à cet acte de démolition. Quoique les Défendeurs aient été vus avec la foule, ou à peu de distance, cela ne prouve pas qu'ils aient pris part avec les autres, dont, assez singulièrement, pas un seul n'a été identifié. Et les témoins eux-mêmes étaient là, s'ensuit-il qu'ils ont démoli ou pris part à la démolition de la maison du Demandeur. Dans le cas même où dans leur intérieur, ils auraient approuvé cet acte outrageant, ou que, par leur présence, ils auraient donné à penser qu'ils ne le désapprouvaient pas, va-t-on les condamner pour cela ? Ils n'étaient pas obligés d'arrêter les perturbateurs ; ils n'eussent pu le faire d'ailleurs, la foule étant composée d'une centaine de personnes. Il faut bien se garder, dans des occasions comme celle-ci, dans le désir louable de punir les actes répréhensibles, comme l'est celui dont se plaint le Demandeur, de rendre solidaires de ces outrages, des gens qu'on n'a aucunement prouvé y avoir pris part ; autant rendre responsables et passibles de dommages tous ceux ou celles qui étaient dans le voisinage de la maison du parlement, en 1849, et qui ou riaient, ou ne disaient rien, ou ne s'opposaient pas à cet acte de vandalisme. Je pense que la cour de première instance a bien jugé, parce qu'il n'y a pas

de preuve contre les Défendeurs. Le jugement devrait être confirmé.

BRUNEAU, J. : Le Demandeur soutient qu'il a établi les faits suivants : 1° qu'il était propriétaire et en possession de l'immeuble, dépendances et autres biens décrits en sa déclaration ; 2° que ces biens ont été détruits ou enlevés, et qu'il a souffert des dommages ; 3° que les Défendeurs ont pris part à la démolition de ses biens ; que c'est de leur assentiment et par leur participation qu'il a souffert ces dommages ; 4° qu'il y a eu entente et conspiration entre les Défendeurs pour détruire la propriété du Demandeur. Les Intimés prétendent, au contraire, que l'Appelant a complètement failli sous tous les rapports, et que la preuve faite par les Intimés est des plus fortes, et qu'il est établi par icelle qu'ils se sont trouvés là par hasard n'ayant fait que passer par les lieux, qu'ils étaient à distance de la maison du Demandeur et de la foule, n'ayant aucunement participé dans l'outrage. La majorité de la cour pense différemment, et est d'opinion que le Demandeur a prouvé les principaux allégués de sa déclaration, et qu'en conséquence la cour de première instance a mal jugé, en déclarant le contraire et en renvoyant l'action du Demandeur, et que ce dernier, en conséquence, a droit de recouvrer des dommages contre les Défendeurs. J'ai cru nécessaire de faire précéder l'examen de cette partie des témoignages qui inculpe les Défendeurs de quelques remarques préliminaires sur la nature de cette action, la loi qui lui sert de base et la preuve qu'elle exige. L'esprit de la législation moderne, chez tous les peuples civilisés, jouissant de constitution analogue à la nôtre, reconnaît et établit, de la manière la plus formelle, la justice du principe de rendre responsables des délits de la nature de celui dont il s'agit, commis dans son sein, tous les membres de la société, par l'acte de quelques-uns d'entre eux, acte auquel, non seulement ils n'ont pas participé, mais qui leur était entièrement inconnu, qu'ils eussent empêché même, si commis en leur présence, en décrétant que tous villes ou villages incorporés seront tenus d'indemniser tous ceux dont la propriété aurait été détruite dans une émeute, par des attroupements tumultueux, les autorisant d'avance de cotiser à cet effet toutes les propriétés, et donnant une action directe contre les corporations pour le dommage souffert, à défaut de leur part d'indemniser la partie qui aura ainsi souffert. Le Code civil, en traitant des délits, n'a fait que consacrer les principes reçus dans l'ancien droit français sur cette matière, et les engagements ou obligations que la loi fait naître, à l'occasion des délits ou des *quasi* délits, sont compris dans les articles 1382 et 1383. Le premier porte : " tout fait quelconque de l'homme qui cause à autrui du dommage, oblige

celui par la faute duquel il est arrivé à le réparer." Toullier, commentant cet article l'explique comme suit : " Cet article, " comprend généralement tous les faits quelconques qui " causent immédiatement et par eux-mêmes, et le mot *fait* est " pris ici dans le sens le plus étendu, et comprend non seule- " ment toutes les actions et omissions nuisibles à autrui, mais " encore les réticences " ; " enfin," ajoute-t-il, " la disposition " de notre article comprend, dans le mot *fait*, la faute que " commet celui qui, pouvant empêcher une action nuisible, ne " l'a pas empêchée. Il est censé l'avoir fait lui-même. C'est en " effet une sorte de complicité que de ne pas empêcher une action " nuisible, quand on en a le pouvoir ; on doit donc en répondre " civilement." Toullier, tome 10, n°s 116 et 117. C'est un principe reçu chez toutes les nations civilisées. Le Code prussien porte : " celui qui souffre sérieusement ce qu'il pouvait ou de- " vait empêcher, en répond comme s'il l'avait ordonné." (Code prussien, partie 1ère, titre 6, n° 59.) Les actes nuisibles à autrui sont divisés en deux classes : 1° attentat à la personne ou aux droits personnels d'autrui ; 2° attentat à sa propriété ou à ses droits réels. La première comprend toutes les atteintes, à la sûreté, à la liberté, à la réputation ou à l'honneur des personnes, ou à l'exercice de leurs droits personnels. La seconde comprend tous les attentats contre la propriété ou le bien d'autrui, lorsqu'on le dévaste ou détériore, lorsqu'on le prive de sa jouissance ou de sa possession, lorsqu'on attente à ses droits réels, ou lorsqu'on l'empêche d'en acquérir ; or tous ces attentats, tant à la *personne* qu'à la *propriété*, sont également tous défendus et réprimés par des peines et des amendes, ou la réparation du dommage qu'ils ont causé. (Toullier, tome 10, n° 121.) En voilà suffisamment, je pense, pour établir le droit d'action au Demandeur contre les Défendeurs, et la preuve va le constater dans l'instant. Les faits de la destruction de la propriété du Demandeur, par un rassemblement tumultueux d'hommes, est prouvé par tous les témoins, tant ceux de la défense que ceux de la demande. Les Défendeurs ont-ils pris part à cet attentat, directement ou indirectement, sont-ils coupables par action ou omission, ou autrement ? La lecture des parties saillantes des témoignages constate la vérité. Ou je me fais illusion, ou il existe dans le témoignage une preuve évidente, non que les Défendeurs se sont trouvés là par accident, qu'ils n'ont fait que passer par les lieux et qu'ils continuèrent de suite leur route vers le village, mais, au contraire, qu'ils faisaient partie de cette foule d'émeutiers qui ont commis l'attentat, et qu'ils y ont coopéré, sinon d'une manière aussi active que plusieurs d'entre eux, au moins, en encourageant par leur présence l'acte de vandalisme commis sous leurs yeux. La conspiration, nous ne la trouvons pas, en effet, dans les procédés

d'une assemblée régulièrement organisée, nous ne voyons pas d'élection de président, de secrétaire, nous ne voyons point de résolutions régulièrement faites et secondées, d'aller en masse détruire la propriété du Demandeur et de quelques autres qui se trouvaient dans le même cas ; non, mais nous trouvons un complot formé dès le matin, dans le village, pour détruire les maisons des personnes en question ; nous voyons la population mâle presque tout entière du village du Sault St-Louis, se diriger par intervalles sur un seul point, la demeure du Demandeur, dans le bois, à trois milles du village, et, vers midi, tout le monde était rendu sur les lieux et attendait là jusqu'à la fin de la journée, et ce n'est que sur les cinq heures du soir lorsqu'il est presque impossible de reconnaître les personnes, que l'œuvre de destruction commence ; pas moins de cinquante personnes entrent dans la maison, une maison de vingt pieds carrés, en jettent les meubles dehors et les brisent, en chassent le Demandeur et sa famille et finissent par démolir la maison complètement. Et l'on veut exiger que le Demandeur, dans des circonstances semblables, puisse nommer celui d'entre ces assaillants, qui a brisé tel ou tel meuble, qui a défait telle ou telle partie de sa maison ! c'est exiger une preuve impossible, la loi n'exige pas telle chose et ne peut l'exiger, sans permettre l'impunité. Il suffit, dans des cas semblables, de faire la preuve que le Demandeur a faite pour qu'il ait droit d'exiger d'une cour de justice, la punition de ceux qui directement ou indirectement ont contribué à l'attentat commis, et, suivant la majorité de la cour, les Défendeurs sont du nombre ; nous trouvons établi que, sans avoir travaillé activement, ils étaient là, sinon comme une espèce de corps de réserve pour soutenir les assaillants en cas de résistance, à tout événement, pour les encourager par leur présence dans la voie de fait prouvée par tous les témoins. Il est heureux que le Demandeur ait pu, dans des circonstances aussi difficiles, faire une preuve aussi forte, ayant été obligé de recourir au témoignage, je ne dirai point de témoins hostiles, mais de complices, pour établir la cause ; je dis heureusement, car, si, dans le cas actuel, les Demandeurs eussent pu échapper à la vengeance de la loi, les conséquences les plus désastreuses pour l'avenir en résulteraient pour cette localité. L'enfant de la nature n'est que trop porté à se faire justice à soi-même, qu'il apprenne de suite que personne n'a et ne doit avoir ce droit. La hache et le couteau, au lieu d'être pour lui comme maintenant, des instruments utiles et inoffensifs, reprendraient, comme autrefois, leur rôle d'instruments de destruction et de mort, dont on ferait usage dans les troubles pour assouvir la haine et la vengeance. Qu'il sache plutôt que la porte des tribunaux est toujours ouverte pour rendre jus-

tice à tout le monde, à lui, comme aux autres, et que, si la loi se trouvait insuffisante pour le protéger contre les griefs dont il pourrait avoir à se plaindre, en s'adressant au gouvernement et à la législature il rencontrerait la protection dont il peut avoir besoin.

LA COUR : " Considérant qu'en déclarant, par son jugement du 28 octobre 1858, que le Demandeur n'avait pas établi les allégués essentiels de son action, la cour de première instance n'a point fait une appréciation exacte de la preuve, ses allégués étant suffisamment établis pour donner gain de cause au Demandeur, infirme le jugement et condamne les Défendeurs, conjointement et solidairement, à payer au Demandeur la somme de £30. AYLWIN et MONDELET, Juges, différant." (4 *J.*, p. 367, et 10 *D. T B. C.*, p. 377.)

DOUTRE, DAOUST et DOUTRE, pour l'Appelant.

CARTER, ED., pour les Intimés.

COMPENSATION.

COUR SUPÉRIEURE, Ste-Scholastique, 16 mai 1859.

Coram BADGLEY, J.

PREVOST *vs.* LEROUX.

Jugé : Qu'un prix de vente peut se compenser au moyen de dommages résultant de la fraude ou du dol évident, et que dans l'espèce la fraude est palpable, et compensation doit s'établir. (1)

Le 29 octobre, 1847, J. A. Berthelot, vend une terre située à St-Jérôme à Joseph Leroux *alias* Cardinal, le Défendeur, moyennant 1000 livres anciens cours, payable en 10 paiements de 100 livres chaque, avec intérêt de l'échéance ; à cet acte, Pascal Persillier dit Lachapelle intervint et se porta caution simple du Défendeur, à la garantie du prix de vente, et hypothéqua une terre située à St-Jérôme, à l'effet de son cautionnement. Enregistrement de l'acte de vente, le 13 novembre 1847. Le 26 janvier 1856, le Défendeur vend sa terre à Cyrille, son fils, qui la vend, le 16 mars 1856, à Paul Deschambault. Le 3 novembre 1848, Berthelot transporte la balance de son prix de vente à Toussaint Barbeau, acceptation du transport par le Défendeur, le 25 mars 1856. Le 23 mai 1856, Toussaint Barbeau transporte la balance du prix à Melchior Prévost, notaire, à St-Jérôme. Signification au Défendeur, le 5 février 1857. Le 6 mars 1857, action hypothécaire par Melchior Prévost, contre Paul Deschambault, alors détenteur de l'immeuble affecté au prix de vente, s'élevant alors en capital et intérêt à

(1) V. art. 1188 C. C.

£49 18s. 8d. Le 18 avril 1857, Paul Deschambault délaisse l'héritage, et curateur est créé au délaissement. Le 21 juillet 1857, exécution contre l'immeuble. Le 23 décembre 1857, vente de la terre adjugée pour £10. Les frais de la poursuite s'élèvent à £16 4s. 2d. et frais de la vente par le shérif £14 8s. 6d. Toutes ces sommes forment celle de £85 12s. 8d., sur laquelle il faut déduire celle de £10, montant de la vente opérée par le shérif, laissant ainsi celle de £75 12s. 8d., encore due, pour le recouvrement de laquelle, Melchior Prévost, ayant discuté l'immeuble vendu au Défendeur, avait le droit de poursuivre Lachapelle, la caution. Le Défendeur se trouve propriétaire et détenteur de l'immeuble affecté par Lachapelle à la garantie de son cautionnement, par l'acte du 29 octobre 1847. Le 11 janvier 1858, Melchior Prévost transporte à Wilfrid Prévost, le Demandeur, la balance due, savoir, £75 12s. 8d. et tous les intérêts échus et à échoir. L'action est portée pour le recouvrement de la somme de £75 12s. 8d. hypothécairement contre le Défendeur. A cette action, le Défendeur a plaidé : 1° que Toussaint Barbeau, cédant de Melchior Prévost, étant curateur à la succession vacante de Lucksey, et voulant se démettre de sa curatelle, s'adressa au Défendeur, et lui remit ce qu'il avait en main appartenant à cette succession, déduction faite du prix de vente dû alors par l'acte du 29 octobre 1847, et conclut à la nullité des transports, et plaidait paiement ; 2° qu'il a été fraudé par Melchior Prévost ; que, le jour fixé pour la vente, par le shérif, de la terre saisie et vendue sur le curateur au délaissement, le Défendeur se trouvait au bureau de Melchior Prévost, à St-Jérôme ; que là et alors, Prévost aurait dit à une vingtaine de personnes alors présentes, et s'adressant au Défendeur de ne pas enchérir sur la terre ; que le Dr Dorion était un des créanciers du Défendeur, qu'il avait trompé le Défendeur, et qu'il fallait lui faire perdre sa créance ; que le Défendeur était pauvre, et qu'il fallait lui faire avoir sa terre et épargner des frais ; qu'il (Prévost) allait acheter la terre pour une bagatelle, et la remettrait de suite au Défendeur, qui pourrait ainsi la vendre et payer ses créanciers ; que, rendu à l'enchère, personne ne mit, et la propriété fut adjugée à Melchior Prévost pour £10 ; que la terre valait alors et aurait pu se vendre £125 au moins ; que se fiant sur la promesse et la parole de Melchior Prévost, le Défendeur serait entré en arrangement immédiatement pour revendre la terre à un nommé Robert ; que Robert et lui se sont ensuite adressé plusieurs fois au dit Melchior Prévost, pour se faire consentir la remise de la terre, mais en vain, et que Melchior Prévost l'a ensuite revendue au même Paul Deschambault qui l'avait déjà délaissée ; que, si Melchior Prévost n'eût pas agi de fraude et par dol pour se faire adjuger la terre, pour un prix nominal et très

modique, elle se serait vendue au delà de £125, somme plus que suffisante pour éteindre la dette du Défendeur; qu'ainsi Melchior Prévost a causé au Défendeur des dommages de £100 et au-delà, somme plus que suffisante pour éteindre et compenser celle que le Demandeur réclame; le Demandeur comme cessionnaire de Melchior Prévost est garant de la fraude de ce dernier. Le Demandeur a répondu, alléguant que le Défendeur était débiteur du dit Melchior Prévost, pour des sommes considérables, que ces créances étaient chirographaires, et le seul dol de Melchior Prévost a été de vouloir essayer de s'indemniser de ces créances, en ayant la terre de la manière qu'il l'a obtenue; qu'il n'y a aucun dol ni fraude, et que le Défendeur n'a souffert aucun dommage.

Per Curiam : La fraude est prouvée. Il n'y a aucun doute qu'il y avait intention de tromper le Défendeur; et aucun homme de position ne devrait se rendre coupable de tels actes. La preuve des témoins est positive. Le cédant a promis, avant l'adjudication, d'acheter la terre pour le Défendeur; il se fait adjuger la terre pour £10; il empêche les personnes présentes d'enchérir, sous prétexte qu'il veut faire du bien au Défendeur, lui venir en aide et épargner les frais; afin d'arriver plus sûrement à ses fins, il dit à Lachapelle, un des témoins produits : "Vous êtes créancier du Défendeur, vous venez pour enchérir." Sur réponse affirmative, il dit à Lachapelle : "Je vais payer votre dette, mais n'enchérissez pas." Celui-ci ne le fait pas, quoique décidé à porter son enchère jusqu'à 3000 livres. Après l'adjudication, le cédant renouvelle ses promesses, mais, là et alors seulement, il dit au Défendeur : "Tu me dois, mais tu me payeras." L'autre consent. Le Défendeur avait pris des arrangements avec Robert, l'autre témoin, pour lui vendre la terre; tous deux font différents voyages chez le cédant, mais, sous différents prétextes, il les éloigne, et enfin il vend la terre à Paul Deschambault. S'il eût eu l'intention de remettre la terre au Défendeur, ne pouvait-il pas de suite faire mettre le nom du Défendeur au lieu du sien, comme adjudicataire, et alors il aurait accompli ses promesses; mais non, dans un but de fraude, il éloigne les enchérisseurs, en désintéresse un, et, se fait adjuger la terre pour une bagatelle. Plus encore, le Demandeur a produit le compte du cédant contre le Défendeur, où l'on trouve des charges énormes, et que les hommes les plus haut placés dans leur profession, comme avocat ou notaire, n'auraient voulu coucher par écrit, et il charge même au Défendeur le contrat du shérif, et ses voyages et vacations pour être venu à Montréal, et obtenir ce contrat, £7 10s. Ensuite, totalisant le tout, il donne crédit au Défendeur de la valeur de sa terre qu'il estime lui-même à £125. Il reconnaît donc, par là, que cette terre valait au moins cette somme; la

transaction de sa part a donc été faite contre la bonne foi, et la cour est d'avis que les dommages sont prouvés exister au montant de la différence, depuis £10 que la terre a été adjugée à celle de £125, que le témoin Lachapelle déclare lui-même qu'il l'aurait payée, en sorte que la compensation est admise ; le Demandeur, frère du cédant, ne paraît avoir eu part dans cette fraude, même il dit en ignorer l'existence ; l'eût-il connu, il est probable que le savant Demandeur n'aurait pas consenti à en prendre cession. Malheureusement pour lui, il a oublié de nier l'articulation de faits filée en cette cause par le Défendeur, où il est dit avoir connu tous ces faits, et n'ayant pas nié ces allégués il est censé par la loi les admettre, ainsi, pour cette cause et comme cessionnaire de Melchior Prévost, étant garant des faits de son cédant, la compensation doit être admise, et l'action est déboutée. (3 *J.*, p. 321.)

ARTHUR DUMAS, Avocat du Demandeur.

OUIMET et DENIS, Avocats du Défendeur.

SOCIETE DE CONSTRUCTION.

COUR SUPÉRIEURE, Montréal, 30 septembre 1859.

Coram SMITH, J.

JODOIN *vs.* DUBOIS.

Jugé: 1° Que le droit de convocation, quant aux sociétés de construction, organisées en vertu des statuts 12 Vict., ch. 57, 14 et 15 Vict., ch. 23 et 18 Vict., ch. 116, réside dans la personne du président ou secrétaire de telles associations;

2° Que la réquisition doit être adressée au président et directeurs;

3° Que cette réquisition doit indiquer spécialement les objets pour lesquels la réunion est convoquée;

4° Que la 1ère section de l'acte 18 Vict., ch. 116, n'a pas abrogé les dispositions contenues en la 7e section de l'acte 12 Vict., ch. 57, et qui sont ci-dessus rapportées;

5° Que les règlements de ces associations doivent être enregistrés au désir de la 5e section de l'acte 12 Vict., ch. 57 ;

6° Que l'élection des directeurs doit se faire un à un, et non pas tous à la fois par un même scrutin;

7° Que le président de ces associations doit présider toutes leurs assemblées et que c'est sous sa présidence que les règlements doivent être passés et modifiés.

Par sa requête le Demandeur alléguait ; que Amable Jodoin est un des actionnaires de la " Société de Construction canadienne de Montréal," corps public et incorporé en vertu des statuts 12 Vict., ch. 57, 14 et 15 Vict., ch. 23 et 18 Vict., ch. 116, faisant affaires et tenant son bureau d'affaires en la cité de Montréal, au numéro 35, sur la rue St-François Xavier ; que le dit Jodoin est un des membres prêteurs de la société, et ce, depuis sa fondation ; que la dite société a fait et adopté

des règlements qui sont encore en force et qui n'ont jamais été changés, modifiés ni rappelés depuis son organisation et depuis la première élection de ses directeurs et autres officiers ; qu'entre autres règlements, il en existe un dont la teneur est comme suit : article 9...... que le Requérant est intéressé dans le bon fonctionnement et la bonne administration de la société, et a été élu un des directeurs d'icelle, à l'assemblée générale semi-annuelle des actionnaires et membres de la société régulièrement convoquée et tenue en la cité de Montréal, le 4 avril 1859 ; que le dit Requérant a été ensuite, le 7 avril 1859, élu président de la société, par les directeurs de la dite société, élus à l'assemblée tenue le 4 avril 1859 ; qu'Alexis Mousseau, agent de change, courtier et marchand à commission, de la dite cité, est le secrétaire et le trésorier de la société depuis le 13 avril 1859 ; que Amable Jodoin et Alexis Mousseau, en leur qualité de président et de secrétaire-trésorier, respectivement, sont investis par la loi (savoir 12 Vict., ch. 57, sec. 12) de tous les biens meubles et immeubles et deniers, ainsi que les titres, obligations pour deniers, autres instruments portant obligations et actes appartenant à la société, ainsi que des droits et réclamations d'icelle ; que les directeurs de la société qui ont été élus le 4 avril 1859, sont au nombre de sept, savoir : le Requérant, Jean-Baptiste Alexandre Couillard, J. Emery Coderre, Olivier Deguise, Jos. Barsalou, Jacques Grenier et Louis Gonzague Fauteux, tous de la cité de Montréal, et que leur élection a, là et alors, été dûment faite, en vertu des et conformément aux règlements de la société, pour le terme et espace de six mois, à compter du jour de leur élection ; que tous les directeurs ainsi élus ont ensuite accepté la charge de directeurs, et ont ensuite en différentes occasions, agi comme tels directeurs, et ont ensuite élu le Requérant, président de la société, conformément aux règlements ; que, le 3 mai dernier, et depuis ce jour jusqu'aujourd'hui, Etienne Alexis Dubois a prétendu publiquement avoir été élu, le 3 mai dernier, directeur de la société ; qu'il a répandu et fait répandre dans la cité le bruit qu'il avait ainsi été élu directeur de la société, quoique la chose soit entièrement fausse ; que Dubois n'a pas été, le 3 mai dernier, ni aucun autre jour, élu directeur de la société, dont il a depuis usurpé l'office ; que Dubois, exerce la charge de directeur et en usurpe les fonctions depuis le 3 mai 1859, en prétendant tenir et faire tenir un bureau d'affaires pour et au nom de la société, au numéro 16 de la rue St-Gabriel, en la cité de Montréal, et en prétendant y transiger et y transigeant des affaires au nom de la société et ce, sans avoir droit ou titre à ce faire ; que Dubois, se prétendant un des directeurs de la société, a pris possession d'une partie des biens meubles de la société et des livres, documents et pa-

piers de la société, et les détient dans le bureau qu'il tient et fait tenir, au numéro 16 de la rue St-Gabriel, en la cité de Montréal ; que le Requérant, ni les directeurs de la société, ni aucun des officiers d'icelle, ne peuvent avoir accès aux registres pour en obtenir des copies authentiques ; à ces causes, le Requérant supplie Vos Honneurs de faire émaner un bref, ordonnant au dit Dubois de comparaître devant la Cour Supérieure, à Montréal, en la salle d'audience, au palais de justice, pour répondre à la présente requête, et à ce que Vos Honneurs faisant droit sur la présente requête, la déclarent bien fondée, et à ce que, par le jugement à intervenir, il soit déclaré que Dubois a usurpé la charge et office de directeur de la Société de Construction canadienne de Montréal, le et depuis le 3 mai dernier ; à ce qu'il soit ordonné au dit Dubois d'abandonner et délaisser immédiatement la charge de directeur de la société : à ce que Dubois soit exclu et évincé de la dite charge, et qu'il lui soit défendu d'en exercer les fonctions ; à ce que Dubois soit en outre condamné à payer comme amende et pénalité, pour l'usurpation dont il s'est rendu coupable comme susdit, la somme de cent livres ou quatre cents dollars, ou telle autre somme à laquelle Vos Honneurs jugeront convenable de le condamner suivant la loi faite et pourvue à cet effet, pour être la dite somme payée à qui de droit et suivant que pourvu par la loi."

A cette requête, le Défendeur plaida : qu'il est faux qu'à l'époque de l'institution de cette action, la société ait fait affaires à l'endroit indiqué en la requête ; que, par les lois en vertu desquelles la société a reçu et continué à avoir une existence légale, les différents membres de la société étaient et sont autorisés à s'assembler, de temps à autre, et de faire, établir et constituer toutes les règles et règlements convenables à sa régie, que la majeure partie des membres de la société ainsi assemblée jugerait à propos d'établir, comme aussi d'amender et modifier, de temps à autre, les dits règlements, suivant que l'occasion l'exigerait, ou de les annuler et abroger, et d'en faire de nouveaux, sous les restrictions contenues dans la loi (12 Vict., ch. 57), et que la société est également autorisée, par la loi, à choisir et nommer, de temps à autre, un nombre quelconque de ses membres, lequel doit être déterminé, ainsi que leur qualification, par des règlements de la société, aux fins de former un bureau de directeurs qui doivent élire un président et un vice-président, avec pouvoir de déléguer aux directeurs tous ou chacun les pouvoirs qui leur sont conférés par la loi (12 Vict., ch 57) pour être exécutés, lesquels directeurs ainsi élus et nommés doivent continuer à agir en cette qualité pendant tout le temps fixé par les règlements de la société, les pouvoirs des directeurs étant préa-

lablement définis dans les règlements; que, par la loi, il est spécialement pourvu que rien de contenu en icelle n'aura l'effet d'empêcher aucune modification ou amendement des règlements pour la direction de la société, en la manière qui serait de temps à autre prescrite par les règlements de la société, et que tous les règlements faits et établis, de temps à autre, pour la direction de la société, et enregistrés suivant que prescrit par la loi dans un livre tenu à cette fin, seraient obligatoires pour les membres et les officiers de la société, et ses contributeurs et leurs représentants, lesquels sont tous censés en avoir eu pleine connaissance par la confirmation et l'enregistrement susdit; que, par les lois affectant l'existence et la régie de la société, il est pourvu que la société sera et est autorisée à passer et faire telle modification, amendement, rescision ou abrogation des règlements de la société, à toute assemblée générale des actionnaires de la société, sans limitation quant au nombre des actionnaires présents à telle assemblée, pourvu que plus de la moitié du nombre des membres de la société signent une réquisition convoquant telle assemblée générale des actionnaires, et recommandant une modification, rescision ou abrogation des règlements de la société, spécifiant les termes d'icelles, et que chaque membre notifié du changement par la voie de la poste dans un délai de 15 jours; que, le 4 avril dernier, il existait un règlement de la société conçu dans les termes suivants, savoir: "Art. 14. Une assemblée générale semi-annuelle des membres se tiendra au bureau de la société, ou à tout autre place que le bureau désignera, le premier lundi du mois d'avril et du mois d'octobre chaque année, commençant en octobre prochain (et dans le cas où ce seraient des jours de fête, le jour suivant) dans le but d'élire des directeurs pour le semestre suivant, et pour tout autre objet d'intérêt général ayant rapport à la régie de la société, et, à chacune des dites assemblées semi-annuelles, il sera soumis un rapport clair et complet de l'état des affaires de la société, durant les six mois précédents, et chacun de ses rapports périodiques sera attesté par deux auditeurs nommés par les directeurs;" qu'en vertu du dit règlement, une assemblée semi-annuelle des membre de la société a eu lieu, le 4 avril dernier, et que les personnes nommées en la requête, Amable Jodoin, Jean-Baptiste A. Couillard, Joseph Emery Coderre, Olivier Deguise, Joseph Barsalou, Jacques Grenier et Louis Gonzague Fauteux ont été élus directeurs de la société; que les membres de la société, jugeant à propos de modifier, amender, rescinder et abroger le règlement suscité, réglant l'époque de l'élection des directeurs de la société et la durée de leurs fonctions, auraient adopté les voies indiquées par la loi pour opérer tels modification, amendement, rescision et abrogation

et que plus de la moitié du nombre des membres auraient, dès avant le 16 avril dernier, signé une réquisition convoquant une assemblée générale des actionnaires de la société, et recommandant une modification, rescision et abrogation du règlement suscité, spécifiant les termes d'icelles, le tout dans les termes suivants, savoir: "attendu qu'il est expédient d'amender le 14e article des règlements de cette société, de manière à ce que le dit article soit conçu comme suit, savoir: "une assemblée générale annuelle des membres se tiendra au bureau de la société, ou à tout autre place que le bureau désignera, le premier mardi du mois de mai chaque année, commençant le premier mardi du mois courant (1859) et dans le cas où ce serait un jour de fête, le jour suivant, dans le but d'élire des directeurs pour l'année suivante, et pour tout autre objet d'intérêt général ayant rapport à la régie de la société et, à chacune des dites assemblées annuelles, il sera soumis un rapport clair et complet de l'état des affaires de la société, durant l'année précédente, et chacun de ces rapports périodiques sera attesté par deux auditeurs nommés par les directeurs." "Les soussignés formant plus de la moitié du nombre des membres de la société convoquent, par les présentes, une une assemblée générale des actionnaires, pour être tenue dans dans les salles de l'Institut Canadien, le troisième jour de mai prochain, à 7½ heures du soir, pour prendre en considération la modification que les soussignés recommandent, ainsi que la rescision et abrogation du 14e article des règlements, tel qu'existant, et pour là et alors adopter tous procédés nécessaires pour mettre à exécution l'article des règlements ainsi amendés, Montréal, 16 avril 1859;" que la convocation ainsi formulée et signée, aurait été adressée à tous les membres de la société, et que chaque membre aurait été notifié du changement suggéré et demandé par la majorité des membres par la voie de la poste, dans un délai de quinze jours, avant le premier mardi du mois de mai courant, savoir: un délai de quinze jours, avant le trois mai courant, jour fixé dans la convocation pour la dite assemblée générale; que, le trois mai courant, l'assemblée générale des actionnaires de la société convoquée par la réquisition sus-citée a régulièrement eu lieu, aux jour, heure et lieu indiqués en icelle; qu'il a été là et alors constaté que la dite assemblée avait été convoquée par plus de la moitié des membres, et qu'à telle assemblée, l'amendement recommandé a été adopté par les membres présents à la dite assemblée; que l'adoption du dit amendement ayant anéanti le règlement en vertu duquel les personnes élues comme directeurs, le 4 avril dernier, pouvaient agir en la qualité de directeurs, les pouvoirs des dites personnes comme tels directeurs se sont terminés avec l'existence du règlement, savoir, par l'adoption de l'amen-

dement susmentionné, et que la société était tenue de procéder à l'élection de nouveaux directeurs, afin de mettre le règlement tel qu'amendé à exécution ; que, de fait, les membres de la dite assemblée, le 3 mai courant, auraient, là et alors, procédé à l'élection d'un bureau de directeurs, pour servir comme tels directeurs durant l'époque fixée par le règlement tel qu'amendé, et que les personnes suivantes auraient, là et alors, été dûment élues, choisies et nommées comme tels directeurs, savoir : Etienne Alexis Dubois, le Défendeur, Joseph Emery Coderre, Olivier Deguise, Charles Lacaille, David Beauchamp, John Feron et Joël Leduc ; que le Requérant a concouru dans les procédés de la dite assemblée, délibéré et voté en icelle ; que, le 5 mai courant, une assemblée du bureau des directeurs élus à l'assemblée générale du 3 mai courant, aurait eu lieu, et que les directeurs suivants auraient été présents, savoir : David Beauchamp, Olivier Deguise, Joël Leduc, Joseph Emery Coderre, John Feron et le Défendeur en cette cause, et qu'à telle assemblée, le Défendeur aurait été régulièrement et unanimement nommé président de la société pour l'année courante ; que, vu ce que dessus, le Défendeur est bien fondé à exercer les charges de directeur et président de la société.

Le Demandeur répondit : " Que, par la septième clause de l'acte du parlement de cette province, passé dans la douzième année du règne de Sa Majesté, intitulé : " Acte pour encourager l'établissement de sociétés de construction dans le Bas-Canada." Il est statué : " Qu'aucun règlement enregistré comme susdit ne sera changé, rescindé ou abrogé, à moins que ce ne soit à une assemblée générale des membres de telle société, convoquée par le secrétaire ou président de telle société, à la suite d'une réquisition à cet effet, d'au moins quinze membres de telle société ; laquelle réquisition indiquera les objets pour lesquels la réunion est convoquée, et sera adressée au président et aux directeurs, et, sur ce, chaque membre sera notifié du changement par la voie de la poste, dans un délai de quinze jours, et telle assemblée devra être composée d'au moins un tiers des actionnaires, dont les trois quarts devront concourir dans telles modifications ou adoptions ; que, par un acte du parlement de cette province, passé dans la dix-huitième année du règne de Sa Majesté, pour amender l'acte ci-dessus cité, il est statué comme suit : " 1° la partie de la septième section du dit acte qui prescrit qu'aucun règlement ne sera changé, rescindé ou abrogé à moins que ce ne soit à une assemblée générale des membres d'une telle société, laquelle assemblée devra être composée d'au moins un tiers des actionnaires, sera et elle est par les présentes abrogée ; 2° pourvu que plus de la moitié du nombre des membres d'une société de construction signent une réquisition convoquant une assemblée générale des action-

naires, et recommandant une modification, rescision ou abrogation des règlements de la dite société, spécifiant les termes d'icelles, la dite assemblée, sans limitation quant au nombre des actionnaires présents, sera et est par le présent acte, autorisée à passer et faire tels modification, amendement, rescision ou abrogation," que, par les dites clauses des actes ci-dessus cités, aucune assemblée ne peut être convoquée dans la but d'abroger un règlement de toute telle société, à moins que la réquisition convoquant telle assemblée ne soit adressée au président et aux directeurs de la société, et que l'assemblée ne soit convoquée par le secrétaire ou président de telle société, et que l'acte ci-dessus en dernier lieu cité, n'amende l'acte ci-dessus en premier lieu cité, que quant au nombre des signataires de la réquisition et des membres qui devront être présents à la dite assemblée ; que, le 4 avril dernier et le 3 mai courant, il existait des règlements dûment adoptés et enregistrés pour régir la société parmi lesquels se trouvent les suivants : " Article 9. Les affaires de la société seront sous le contrôle et la décision d'un bureau de sept directeurs, dont quatre formeront un quorum, et qui choisiront entre eux un président et un vice-président ;" " Art. 12. Les directeurs demeureront en charge jusqu'à ce que leurs successeurs aient été élus, à moins qu'ils ne cessent de l'être par leur résignation ou aucune des causes suivantes, savoir : décès, absence aux assemblées durant trois mois consécutifs, insolvabilité, banqueroute et arrestation pour crime ou délit ;" " Art. 14. Une assemblée générale semi-annuelle des membres, se tiendra au bureau de la société, ou à toute autre place que le bureau désignera, le premier lundi du mois d'avril et du mois d'octobre, chaque année, commençant en octobre prochain (1857) (et dans le cas où ce seraient des jours de fête, les jours suivants) dans le but d'élire des directeurs pour le semestre suivant ;" que c'est en vertu des règlements susdits que le Demandeur et les autres personnes mentionnés dans la déclaration ont été légalement élus directeurs de la société, le premier lundi d'avril dernier, et que le Demandeur a été ensuite légalement élu président de la société ; que tous les procédés allégués par le Défendeur, concernant une certaine assemblée de la société que le Défendeur prétend avoir eu lieu le trois mai courant, sont nuls, illégaux et contraires aux statuts ci-dessus cités et aux règlements de la société, et ne peuvent avoir conféré au Défendeur aucun droit à la charge qu'il prétend exercer ; que la prétendue assemblée n'a pas été convoquée d'une manière légale ; que la réquisition convoquant telle assemblée n'a pas été signée par plus de la moitié du nombre des membres de la société, ni même par la moitié d'iceux ; que tous les noms apposés au bas de la réquisition n'y ont pas été mis par les personnes que ces

noms indiquent, et ne sont pas leurs signatures ; qu'un grand nombre des signatures ont été obtenues par fraude, par surprise et sur de fausses représentations, la personne qui demandait et sollicitait ces signatures disait qu'il ne s'agissait que de faire un changement au moyen duquel les directeurs seraient à l'avenir élus que pour un an au lieu de six mois, mais prenant soin de ne pas dire qu'il s'agissait de faire immédiatement de nouvelles élections ; qu'un grand non bre des personnes dont les noms se trouvent au bas de la réquisition n'étaient pas, lorsque leurs noms ont été ainsi apposés, et ne sont pas encore membres ni actionnaires de la société ; que la réquisition ne porte aucune date, et que la prétendue convocation n'a pas été avertie par la voie des journaux ni transmise à tous les actionnaires ; que la réquisition n'a pas été adressée aux président et directeurs de la société, et que la dite assemblée n'a pas été convoquée en la manière prescrite par la loi et par les règlements de la société ; que le but de la dite assemblée n'était pas suffisamment indiqué dans la convocation, et laissait des doutes, savoir : si l'on devait amender ou abroger certain règlement alors en force ; que la dite convocation ne mentionnait nullement qu'on élirait de nouveaux membres à la dite assemblée du 3 mai dernier, ni que l'on démettrait ou destituerait les directeurs alors en charge et qui avaient été, le 4 avril précédent, élus pour six mois ; que, de plus, en supposant, ce qui est formellement nié, que la dite assemblée aurait été convoquée régulièrement et légalement, les personnes composant la dite assemblée n'avaient aucun droit de démettre et destituer les directeurs qui avaient été, le 4 avril précédent, légalement élus pour six mois, ni de les remplacer par de nouveaux directeurs ; que le nouveau règlement que le Défendeur allègue avoir été adopté à la dite assemblée du 3 mai courant, ne pouvait, dans tous les cas, avoir d'effet que pour le futur, mais ne peut avoir d'effets rétrospectifs ni priver les directeurs élus, le 4 avril dernier, du droit qui leur était acquis par la loi et les règlements de la société, de demeurer en charge pendant un semestre ; que tous les procédés qui ont pu être adoptés par la dite assemblée du 3 mai dernier n'ont pu affecter la position du Demandeur, ni des autres directeurs, et n'ont pu avoir l'effet de les mettre hors de charge, ni de faire cesser leurs fonctions ; que les procédés dont le Défendeur produit de prétendus extraits comme ayant été adoptés le 3 mai dernier sont nuls et illégaux sous tous les rapports ; que la dite assemblée n'a pas été convoquée et organisée légalement ni régulièrement, qu'elle n'a pas été présidée par le président de la société, et que les prétendus procédés n'ont jamais été signés par le président ni par le secrétaire de la société ; que le 3 mai courant, un grand nombre des actionnaires et membres

de la société se sont rendus dans les salles de l'Institut Canadien, en la cité de Montréal, et, là et alors, ont signifié aux personnes assemblées pour procéder au nom de la société, et spécialement aux personnes qui prétendaient agir comme président et secrétaire de la dite assemblée et de la société, un protêt par lequel ils signalèrent quelques-unes des illégalités des procédés ; qu'il est faux que le Demandeur ait participé aux procédés de la dite assemblée du 3 mai courant ; qu'il est également faux qu'il ait été, là et alors, constaté que la dite assemblée avait été régulièrement convoquée par plus de la moitié des membres de la société, mais qu'au contraire, un des actionnaires et membres de la société ayant requis spécialement ceux qui prétendaient ainsi procéder, de montrer la liste des actionnaires, afin de constater quel en était le nombre, on refusa de ce faire, et l'on prit indistinctement les votes de toutes les personnes présentes, sans qu'il fût possible de constater si les personnes qui votaient étaient ou non membres de la société ; que, vu tout ce que dessus, il est évident que le Défendeur n'a pas été et n'a pas pu être élu directeur de la société à la dite assemblée du 3 mai courant ; que la dite élection par lui invoquée est nulle et illégale et ne peut lui conférer le droit d'exercer la charge de directeur [illegible] celle de président de la société, lesquelles charges il a usurpées et détient illégalement.

Doutre, pour la défense, prétendit à l'argument : 1° que toutes les questions soulevées sont dominées par le principe que les corporations sont républicaines et démocratiques, et qu'à moins de restrictions positives, la majorité doit tout gouverner ; (1) que si des questions nouvelles surgissent, les tribunaux doivent s'abstenir d'intervenir (2) et que c'est en ce sens que tend la législation moderne, ainsi que le prouvent nos derniers statuts, touchant les institutions municipales ; 2° que la forme de la convocation, même lorsqu'elle dévie de la loi, ce qui n'est pas le cas en cette instance, peut être régularisée par la présence de ceux qui ont droit de vote ; (3) que, si l'avis de convocation émane de personnes qui n'ont pas le droit de le donner, la présence de ceux qui s'en plaignent est un acquiescement, (4) et que le pouvoir de faire des règlements résidant chez les membres, le pouvoir de convoquer l'assemblée pour faire les règlements est coexistant et accessoire (5) ; 3° que la

(1) Angell and Ames, on *Corporations*, n° 499.

(2) Grant, on *Corporations*, p. 211.

(3) Wilcock, on *Corporations*, n° 69.

(4) Angell and Ames, n° 46[illegible]

(5) Id., n° 327.

charte (12 Vict., ch. 57) autorisant les membres à nommer des officiers et à les remplacer de *temps à autre*, ce serait violer cette charte que de limiter les pouvoirs des membres à cet égard, par des règlements ou autrement, ce qui ne se peut ; (1) que le pouvoir de rappeler un règlement est coexistant avec celui d'en faire ; (2) 4° que le pouvoir de démettre un officier est inhérent à toute corporation, (3) et qu'il suffit d'en élire un pour le remplacer, pour qu'il soit démis *ipso facto* (4) ; 5° que le rappel d'un règlement a le même effet que le rappel d'un statut par le parlement ; (5) et que les officiers dont la durée d'office est fixée par un règlement, perdent leur office par le rappel de ce réglement (6) ; 6° que, quant à la présidence de l'assemblée, celui qui l'avait présidée l'avait fait sans contestation, que ni la coutume, ni la loi, ni aucun règlement n'exigeait que le président de la corporation fût au fauteuil, dans une assemblée générale et extraordinaire, que la présence du président à l'assemblée était un acquiescement à la forme des procédés, sinon au fond (7) ; 7° que, quant à la prétention que le règlement tel qu'amendé devait être enregistré, avant que l'élection eût lieu, en vertu de ce règlement, en premier lieu, cela n'est pas plaidé, et, en second lieu, le règlement amendé ayant été extrait du livre tenu à cet effet, il devait, à moins de preuve contraire, être présumé enregistré *instanter*, du moment qu'il était passé, comme les jugements des cours sont censés enregistrés au moment où ils sont prononcés ; 8° que la doctrine, soutenue par Wilcock sur la nécessité de proposer les candidats un à un, n'est pas applicable à l'élection faite au scrutin, *vote by ballot*, surtout lorsque l'élection a lieu sans contestation, comme dans le cas actuel, et qu'elle est faite de bonne foi (8) ; 9° que le mode de convocation observé en cette circonstance était celui qu'avait suivi la société dans une circonstance antérieure ; 10° que la convocation de l'assemblée dont on attaquait les procédés indiquait clairement les objets pour lesquels cette assemblée avait lieu ; que les deux seuls objets pour lesquels elle était convoquée étaient : 1° amender le 14e article des règlements ; 2° mettre à exécu-

(1) Angell and Ames, nos 327, 343 ; Wilcock, nos 11, 12, 227 ; Grant, pp. 80, 81.

(2) Angell and Ames, n° 329 ; Wilcock, 237.

(3) Angell and Ames, p. 100.

(4) Wilcock, nos 75, 649, 652, 703.

(5) Dwarris, on *Statutes*, p. 676.

(6) Wilcock, n° 764.

(7) Grant, p. 245 et suivante.

(8) Angell and Ames, n° 138.

tion le règlement tel qu'amendé, en faisant des élections, et que ces deux objets se trouvent clairement indiqués dans la convocation.

SMITH, J. : The pretention of Petitioner, that he, having been elected for the space of six months, other directors could not come in before the end of his term of office was unfounded, if the by-law had been regularly and legally altered. There is no prohibition in the charter or in the by-laws to alter such a by-law, and, therefore, to abridge the term of office, but, on the contrary, the members of the Association are empowered to make all by-laws which they may deem conducive to the welfare of the Association. The directors have no freehold in their office, and the corporators have a right to pass a by-law abridging their existing term of office. The point now to be considered is whether the by-law invoked by Defendant was regularly passed, and whether it is in force. By the seventh section of the provincial act of 1849, it is enacted : " Qu'aucun règlement enregistré comme susdit ne sera changé, rescindé ou abrogé, à moins que ce ne soit à une assemblée générale des membres de telle société, convoquée par le secrétaire ou président de telle société, à la suite d'une réquisition à cet effet d'au moins quinze membres de telle société, laquelle réquisition indiquera les objets pour lesquels la réunion est convoquée, et sera adressée aux président et directeurs, et sur ce, chaque membre sera notifié du changement, par la voie de la poste, dans un délai de quinze jours ; et telle assemblée devra être composée d'au moins un tiers des actionnaires dont les trois quarts devront concourir dans telles modifications ou abrogations." Defendant said that this provision of the law has been changed by the 1st section of the provincial act of 1855, which is as follows : " La partie de la septième section du dit acte, qui prescrit qu'aucun règlement ne sera changé, rescindé ou abrogé, à moins que ce soit à une assemblée générale des membres d'une telle société, laquelle assemblée devra être composée d'au moins un tiers des actionnaires, sera et est par le présent acte abrogée," and *vide* section 2. The whole act of 1855 is in the nature of a proviso to the act of 1849, and never had the effect of revoking *in toto* the seventh clause, and the abrogation which Defendant pretends to have been made of the seventh clause is unfounded. The seventh section is still in full force and effect, and the duty of the members of the Association is to call upon the president to convene the meetings. The rules of law concerning corporation support this view of the case. Corporations are created to carry out the objects of the associated members, and the law takes out of the whole body the administrative powers and vests them in a body of directors. In every corporation, the

powers are legislative, elective and administrative, and, if the members of a corporation could control absolutely the administration of the directors, it would have the effect to establish an *imperium in imperio,* and to bring at once the dissolution of the corporate body. No corporation could exist under such a state of things and these rules are recognized even by common law. Taking up the by-laws of the association, we find that it is there stated : " Art. 12. Les directeurs demeureront en charge jusqu'à ce que leurs successeurs aient été élus, à moins qu'ils ne cessent de l'être par leur résignation ou aucune des causes suivantes, savoir : décès, absence aux assemblées durant trois mois consécutifs, insolvabilité, banqueroute et arrestation pour crime ou délit. Tout directeur se trouvant dans un de ces cas, sera de fait démis de sa charge, et le bureau de direction le remplacera à une assemblée spéciale convoquée à cet effet par le président." Now such a by-law was not required. The president is always in charge, as long as his successor is not appointed, and has a right to preside over meetings, till a new president is elected, so that the meeting of the 3rd May presided over by Mr. Tellier was illegal on that account. (Wilcock, on corporations, No 69, p. 45.) The summons must be issued by order of some one who has authority to assemble the corporation for that particular purpose. To constitute an assembly there must be a president, and the president of the association is, by common law, the head of the body, he must submit the by-laws and have them enregistered and such powers are delegated to him by law. (Wilcock, No 94, p. 53.) The legal head officer must be present, or the corporate assembly is incomplete (No 95); not only must the head officer be present, but he must attend in his office and preside. The convocation of the meeting of the 3rd May was illegal, not having been made by the president or secretary, according to the provisions of the seventh section of the law of 1849 ; therefore, the by-law which was passed at that meeting, presided over by Mr. Tellier, is null, and the election which then took place of Defendant as a director of the association must be set aside. A by-law cannot be changed without a special notice of the whole proceedings which are intended to be had at the meeting convened for such change. Now, the notice which was given was insufficient with respect to these words : *et pour là et alors adopter tous procédés nécessaires pour mettre à exécution l'article des règlements ainsi amendés.* Another point also to which at first I did not attach much importance, but which is however well founded in law, is: that an election of several directors cannot be made *in toto* by one simple vote upon the whole

board. The election must be made one by one, of each director singly. (1)

Considering that Petitioner hath fully proved the material allegations of his *requête libellée* and that, on the 4th April, 1859, Petitioner was duly elected to fill the office of director of the association called, " Société de Construction canadienne de Montréal," for the time and period pointed out by the by-laws of the association, and that he was afterwards duly elected to be the president of the board of directors duly elected, and, further, considering that Defendant hath failed to establish his right to act as a director or president of the association, and, further, considering the meeting called by the majority of the association, to be held on the 3rd day of May, 1859, was illegally convened and illegally presided over and contrary to the provisions of the existing by-laws of the Association, and that the by-law then and there passed was illegal, null and void and inoperative, and, further, considering that Defendant hath failed to establish in evidence the existence of the said by-law, there being no evidence of its enregistration as required by the by-laws, and that, by reason thereof and by law, Defendant hath shown no legal right or title to hold and occupy the office of director and president of the Association, and that he has thereby illegally intruded himself into the said office of director and president of the association, the court doth maintain the *requête libellée* of Petitioner and the court doth order and condemn Defendant, &c. (3 *J.*, p. 325.)

LA FRENAYE and PAPIN, Attorneys for Petitioner.
DOUTRE and DAOUST, Attorneys for Defendant.
HENRY STUART, Counsel for Defendant.

ATTACHMENT BEFORE JUDGMENT.—AFFIDAVIT.

SUPERIOR COURT, Montreal, 21st November, 1859.

Coram MONK, J.

MILNE *vs.* ROSS et al.

Held : That an affidavit for an attachment before judgment, concluding with averment in the disjunctive that the Plaintiff, without the benefit of an attachment, will lose his debt or sustain damage, is not bad for uncertainty ; also that, although such an affidavit conforming to the 48th section of the 22nd Vic., c. 5, contains special reasons which are in themselves insufficient, yet, if there be averments to answer the requirements of the 10th sec. of the ordinance 25 Geo. III, c. 2, or equivalent thereto, the attachment will be supported under the latter law, notwithstanding it contains the allegations that Defendants continue to carry on their business.

(1) No 544, p. 215, form of election, candidates how proposed.

An attachment before judgment was issued on the affidavit of Plaintiff, alleging "that Defendants, a trading firm, are in "possession of goods and effects, at the city of Montreal, and "are about to secrete the same, and their debts and effects, "with intent to defraud their creditors and deponent, one of "them; that the said firm and the members of it, is and are "traders; that the said firm is notoriously insolvent, has re-"fused to compromise or arrange with its creditors to make a "*cession de biens* to them or for their benefit, and said firm "continues to carry on its trade and is about to secrete its "goods and chattels, with intent to defraud its creditors and "the deponent." The following special reasons were given in support of Plaintiff's belief: 1st That Defendants kept no bank account. 2nd Two of the partners admitted that the present firm had been formed for the purpose of these two partners evading their liabilities. 3rd That they had fraudulently gotten into their possession a quantity of tobacco, which they had pledged to Plaintiff. The Defendants, on their motion, urged that, inasmuch as the 28th section of the 22nd Vic., c. 5, in addition to the essential averment under the ordinance of 25 Geo. III, necessitated special reasons in support of each of the requirements of these found in the action of the statute in question, that the special reasons here given were wholly insufficient to support any one of the requirements of said statute, and the writ must be quashed; that the section of the statute in question, under which the present proceeding was taken, created, under certain circumstances, a presumption that the debtor was about to secrete his estate, although literally such was not the case; that a creditor could not invoke this law, and be entitled to its protection and advantages, save on the condition of conforming to its requirements, which he had failed to do; that the affidavit was not framed in accordance with the requirements of the ordinance of 25 Geo. III; that Plaintiff could not have sworn to a secreting under that ordinance, his present affidavit to the effect that Defendants continued to carry on their business, also that they had a large amount of tobacco, was wholly contradictory of a literal secreting of the estate; that, if the proceeding were held good, under the 25 George III, the new enactment was utterly nugatory as to a *saisie-arrêt*, the additional averments required by it being of no avail whatever, in fact useless; also that the concluding averment as to loss of debt or sustaining damage was insufficient under either law, being in the disjunctive; neither was certain, and the law intended that one at least of the conditions should be made out, in an absolute or positive form, to warrant the proceeding. It was contended for Plaintiff that they had conformed, in all respects, to

the requirements of the 10th section of the ordinance 25 Geo. III, c. 2, on which they intended to rely ; that the special reasons in no way vitiated the proceeding to which they had a right, as if the new law had not been passed. That the 25th Geo. III, warranted the conclusion of the affidavit being in the disjunctive; that a debt could not be lost without the creditor sustaining damage; that therefore the two requirements were in a measure convertible terms.

MONK, J.: The Defendants have objected to the affidavit, for not containing sufficient special grounds, in conformity with the 48th section of the statute 22 Vic., c. 5. The Plaintiff has taken his remedy to be good, either under the statute referred to, or the 10th section of the ordinance 25 Geo. III, c. 2. I am of opinion that it is perfectly good under that ordinance, and does not require the addition of any special reasons. It has been objected too, that the concluding averments in the affidavit should not have been in the disjunctive, but this is in conformity with the law itself, a debt cannot be lost without damage being sustained, these two requisites are in a measure the same, they are convertible, the motion is dismissed. (4 *J.*, p. 3.)

MCKAY and AUSTIN, for Plaintiff.

CROSS and BANCROFT, for Defendant.

CIRCUIT COURT.—JURISDICTION.

CIRCUIT COURT, Montreal, 2nd September, 1859.

Coram SMITH, J., in chambers.

CLAIRMONT et vir *vs.* DICKSON.

Held: That where the term of the lease is less than a year, and the rent payable for that term does not exceed £50, the Circuit Court has jurisdiction, notwithstanding the 5th section of the lessors and lessees Act (18 Vic., c. 108), and notwithstanding that the annual value or rent of the property leased would exceed £50, if the term extended to a period of one year. (1)

The Plaintiffs' declaration set out a lease for the space of five months, at the rate of $150 for said term, which lease had expired, and that Defendant refused to give up possession. Also, that Defendant had used and occupied the premises, with Plaintiffs' permission, for the space of five months, and that the value of the premises was $150 for said period; and that Defendant was owing more than three months' rent, viz., $114, having only paid $36, and concluded in ejectment, and for $114.

(1) V. art. 1195 C. P. C.

This was met by Defendant with an *exception déclinatoire*, because the value or rent of the property, for the space of five months, was the sum of $150, making the annual value or rent amount to $360; and, because, by law, the annual value or rent of the property leased, must determine the jurisdiction of the court, in such cases, the action should have been instituted in in the Superior Court, instead of the Circuit Court, the latter not having jurisdiction in cases over $200; in support, Defendant's Counsel cited sec. 5, 18 Vic., c. 108, which is as follows: "Actions under this act shall be instituted in the usual manner in the Superior and Circuit Courts, and the annual value or rent of the property lessed shall determined the jurisdiction of the court, whatever may be the amount of damages and rent sued for;" and urged that the proper interpretation of this section was, that the annual value of rent which the property would produce ought to be taken as the criterion, not the period of the lease, nor the amount sued for, the object of the law being to draw the distinction between real property over which the Superior Court had jurisdiction, and real property over which the Superior Court only had jurisdiction. The Plaintiffs' Counsel admitted the application of the argument, in cases of a yearly holding or leasing, but denied that it could apply where the lease or occupation was for a period less than one year.

Per Curiam: The court does not consider that there is any allegation of use and occupation, except as subordinate to, and forming part of, the allegation of a specific lease. If the action had been based simply upon a use and occupation, the 16th section would undoubtedly hold good, and the exception must have been maintained upon that section and the 5th section cited. So, in the case of a lease, if it had been an annual lease, the argument of Defendant's Counsel would have been irresistible. As, in this case, however, an annual lease was never contemplated, it is impossible to conceive of the application of the 5th section, and the court, therefore, has no hesitation in dismissing this exception. *Exception déclinatoire* dismissed. (4 *J.*, p. 4.)

Ouimet and Morin, for Plaintiffs.

W. A. Bovey, for Defendant.

Note. This judgment was appealed to the Queen's Bench, and the judgment confirmed in appeal, December, 1859.

EVIDENCE.—FAITS ET ARTICLES.—ADMISSION.

Montreal, 6th September, 1859.

Coram SMITH, J.

THE SAME CAUSE.

Held: That an authentic copy of the Defendant's answers to interrogatories in another suit, when produced with authentic copies of the writ and declaration and other pleadings in such other case, is sufficient evidence to support the allegations of the declaration, where such answers appear to coincide with such allegations, without the necessity of interrogating the Defendant anew either as to his identity, or as to the answers in question.

In this case it was alleged that, in a former suit, which had been dismissed, Defendant had admitted in his answers to interrogatories that he had leased a house from Plaintiffs, for the space of five months, and that the five months having expired, Plaintiffs were entitled to have possession. The Defendant appeared and pleaded want of jurisdiction in the court, but did not plead to the merits. The Plaintiffs fyled, with their declaration, certified copies of the pleadings in the former suit, and a certified copy of Defendant's answers to interrogatories. Apparently, the parties appeared to be the same, the names and description concurring; and, upon examining the answer in question, it was to the effect, that Defendant had leased the house, as alleged, but that Plaintiffs had not complied with the stipulations of the lease, in furnishing him with wood and other articles, which formed part of the lease. The Plaintiffs established by two witnesses that Defendant had occupied the house, and that the furniture in it belonged to Plaintiffs. Upon this proof, Plaintiffs relied for judgment. Defendant's Counsel pretended that the copy of answers to interrogatories, although certified by the prothonotary, could make no evidence against Defendant in this suit; that Defendant, being a party to the suit, and no apparent cause existing why he should not be interrogated in the present suit, it followed that it was necessary to interrogate him anew, not only for the purpose of identifying his person, and the subject-matter of the two suits, but because he should have an opportunity of explaining or making additions to his answers in the former suit. That a copy of the deposition of a witness, in one suit, could not be taken as evidence in lieu of a new deposition, when no apparent cause existed why that witness should not be again produced; that the same rule applied with regard to answers to interrogatories; that, besides this, it was doubtful whether this copy could be taken in lieu of the original answers, it being only a secondary description of evidence; that, even sup-

posing the copy of answers chould be taken as sufficient evidence, yet the answer of the Defendant, being accompanied by a qualification that Plaintiffs had not performed an essential covenant of the lease, the answer could not be divided; that the evidence was therefore insufficient, and the action should be dismissed.

PER CURIAM: The court is of opinion that the evidence is sufficient, although, at first, the court was inclined to believe that there was some foundation in the objection that the copy of answers, made in the former suit, could not be taken in lieu of Defendant's answers in this suit. As to the copy itself, it is certified by the clerk of the court, and it has always been the custom to regard such copy as sufficient evidence. As to the objection that the answer was not unqualified, Defendant, not having pleaded the qualification, cannot now avail himself of it. It is to be observed that Plaintiffs have fyled certified copies of the whole of the record in the former suit, and Defendant, having appeared to the action, and not having pleaded to the merits, by the new statute, he must be regarded as having admitted the action. The judgment of the court, therefore, dismisses Defendant's motion to reject the copy of answers to interrogatories, and awards to Plaintiffs the conclusions of their declaration. Judgment for Plaintiffs. (4 *J.*, p. 6.)

OUIMET and MORIN, for Plaintiffs.

BOVEY, for Defendant.

NOTE. This judgment also appealed from, and the judgment confirmed in appeal, December, 1859.

JURISDICTION.

SUPERIOR COURT, IN APPEAL, FROM THE CIRCUIT COURT AT SHERBROOKE, Sherbrooke, July, 1854.

Coram BOWEN, C. J., SMITH, J.

MORKILL *vs.* CAVANAGH.

Held: That, in a hypothecary action, the circuit within which the *détenteur* holds possession, not the circuit where the original contract stipulating the hypothèque is made, is the place where cause of action arises. (1)

This was an action *hypothécaire* against Cavanagh, founded upon mortgage created by contract between Morkill and one Peoples and his wife. Cavanagh, afterwards, purchased the land hypothecated from Peoples *et uxor.* Morkill sued Cavanagh, who resided in the Richmond circuit, and impleaded

(1) V. art. 34 C. P. C.

him in the Sherbrooke circuit, the contract between Peoples *et uxor* being within the latter circuit. Cavanagh pleaded, by *exception déclinatoire,* that he could not be sued in the Sherbrooke circuit, inasmuch as the cause of action arose in the Richmond circuit, the possession being there, and he having been served there. It was contended by Plaintiff that the cause of action arose where the original contract between Morkill and Peoples *et uxor* was made, and that this gave him the right of action against Cavanagh. On the part of Defendant, it was contended, that the possession of Cavanagh was the only circumstance which gave rise to right of action against him; that the intrinsic rights of Morkill were the same as if the land had never been sold to Cavanagh, but his *remedy*, as against Cavanagh, was changed to a different jurisduction.

SMITH, J.: It is clearly the contract between Cavanagh and Peoples, and not the contract between Morkill and Peoples that gives Plaintiff right of action against Defendant. This contract having been framed in Kingsey, in the Richmond circuit, and Defendant having taken possession of the land there, the cause of action arose there. We think the judgment of the court below dismissing Plaintiff's action, on this ground, must be confirmed. Judgment confirmed. (4 *J.*, p. 8.)

EDWARD CARTER, for Appellant.

J. S. SANBORN, for Respondent.

SHERRIFF'S SALE.—PETITORY ACTION.

SUPERIOR COURT, Sherbrooke, 27th January, 1854.

Coram DAY, J., SHORT, J., CARON, J.

HART *vs.* MCNEIL.

Held: That an *adjudicataire* can maintain petitory action, without having had possession, and that a petitory action, not a writ of possession, is the proper remedy for a Plaintiff *adjudicataire* after the lapse of a year and a day after adjudication against the Defendant upon whom the immoveable is sold. (1)

DAY, J: Two questions arise in this case: can Plaintiff as *adjudicataire* without having had possession, maintain an action *pétitoire?* We are clearly of opinion that the adjudication vests the property in the *adjudicataire*. The next question is, should not Plaintiff have resorted to his writ of possession, as his only recourse against Defendant, he being the only person who has occupied, and Defendant in the cause where the land was adjudged to Plaintiff? If a year and a day had not elapsed

(1) V. art. 712 C. P. C.

since the adjudication, the court would perhaps hold, that the writ of possession is the only recourse, but Defendant holding possession a longer time than a year and a day after the adjudication, has acquired an adverse possession. The petitory action is the proper remedy. Judgment for Plaintiff.

J. S. SANBORN, for Plaintiff.

W. L. FELTON, for Defendant.

SENTENCE ARBITRALE.

COUR DU BANC DE LA REINE, Montréal, 12 octobre 1842.

Coram VALLIÈRES DE ST-RÉAL, J.-en-Chef, ROLLAND, J., GALE, J., DAY, J.

BLANCHET et ux. *vs.* CHARRON.

Jugé: Que le défaut de signification de la sentence arbitrale en entraîne la nullité. (1)

Les Demandeurs réclamaient du Défendeur £28 12s. 8d. montant à lui adjugé par la sentence arbitrale rendue le 25 novembre 1838, en vertu d'un compromis prorogé jusqu'au 26 novembre 1839. Cette sentence arbitrale n'avait été signifiée au Défendeur que le 29 mai 1841. Ce compromis portait un dédit de £12 10s. Dans l'exception péremptoire plaidée par le Défendeur, il alléguait que la sentence arbitrale était nulle, parce qu'elle n'avait jamais été dûment rendue et prononcée aux parties, *nommément* au Défendeur, que notamment elle n'avait jamais été rendue, prononcée et signifiée au Défendeur, dans le délai requis par la loi et celui fixé par le compromis. Le Demandeur répondit à cette exception que le Défendeur aurait dû faire offre de payer la pénalité imposée par le compromis à celui qui refuserait d'acquiescer à la sentence arbitrale et qu'il ne pouvait être reçu à plaider ces irrégularités et nullités (2). L'action du Demandeur fut renvoyée, sur le principe que la sentence arbitrale n'ayant pas été signifiée dans le délai fixé par le compromis, elle était absolument nulle (3). (4 *J.*, p. 8.)

OUIMET et SICOTTE, Avocats du Demandeur.

CHERRIER et MONDELET, Avocats du Défendeur.

(1) V. art. 1352 C. P. C.

(2) Vide 4 *R. J. R. Q.*, p. 38, *Tremblay* vs. *Tremblay*.

(3) Rép. Merlin, v° Arbitrage, n° 34; 2 Biret, *Nullités*, p. 338; Guyot, *Rép.*, arbitrage, p. 547, 549.

DIME.

COUR SUPÉRIEURE, Sorel, mai 1859.

Coram BRUNEAU, J.

FILIATRAULT *vs.* ARCHAMBAULT.

Jugé : 1° Que la dîme doit se partager au *pro rata* du temps de la desserte de chaque curé; 2° que la succession des curés est assujettie au même partage; 3° que l'année ecclésiastique, sous le rapport de la dîme, se compte de la Saint-Michel d'une année à la Saint-Michel de l'année suivante et devient due et payable à Pâques chaque année.

Cette action était instituée par le Demandeur, comme donataire de ses père et mère, qui étaient héritiers mobiliers de leur fils, feu Messire Timothée P. P. Filiatrault, décédé le 30 mars 1858, en la paroisse de la Visitation de l'Ile-du-Pads dont il était alors le curé desservant. Le Demandeur réclamait $436 du Défendeur qui avait succédé à feu Timothée P. P. Filiatrault, comme curé de cette paroisse, depuis le commencement de mai 1858, pour cette partie de la dîme échue à Pâques, 1858, que le Défendeur s'était appropriée et avait convertie à son usage, lors de sa prise de possession de la cure de la paroisse. Entre autres allégués, le Demandeur faisait les suivants : que le Défendeur s'est emparé d'une partie des biens meubles de la susdite succession, depuis le décès du dit Messire Timothée Prime Paul Filiatrault, savoir : 78½ minots de blé, valant 90 centins le minot ; 81¾ minots de pois, valant 80 centins le minot ; 1294½ minots d'avoine, à 37 centins le minot ; 10 minots d'orge, à 60 centins le minot ; 153 minots de sarrazin, à 45 centins le minot ; 8 minots de gabourage (avoine, pois, etc.) à 75 centins le minot ; 2 minots de blé d'Inde à 75 centins le minot ; argent collecté de Pierre Plante, $1.33, formant $698.69 ; que sur le montant susdit, le Défendeur n'a encore remis que douze minots de pois, valant trente-sept centins le minot, faisant quatre piastres et quarante-quatre centins, et deux cent quarante-huit piastres et dix-sept centins pour grains vendus à F. R. Tranchemontagne, et que ce dernier doit payer au Demandeur ; que, partant, la balance restant due par le Défendeur est de quatre cent trente-six dollars et huit centins ; que le Défendeur a consommé tous les susdits grains, et s'est approprié iceux et les a convertis à son usage, depuis le décès du dit feu Timothée Prime Paul Filiatrault, lesquels n'existent plus en nature ; que le Défendeur est toujours resté en possession des dits grains et biens meubles depuis le décès du dit Filiatrault, sans aucun droit.

Le Défendeur plaida que, d'après l'usage reçu et suivi constamment et de temps immémorial, dans les paroisses du Bas-Canada, et, notamment, dans celles du diocèse de Montréal,

l'année ecclésiastique, sous le rapport de la dîme, se compte de la Saint-Michel d'une année à la Saint-Michel de l'année suivante (du 29 septembre au 29 septembre), et la dîme de chaque année commençant susdit à la Saint-Michel devient due et payable à Pâques chaque année ; que la dîme ainsi échue et payable au temps de Pâques, chaque année, est la dîme pour l'année commencée à la Saint-Michel précédente ; que les grains mentionnés en la déclaration en cette cause sont la dîme de la récolte de la dite paroisse de la Visitation de l'Ile-du-Pads pour l'année commençant le vingt-neuf septembre 1857 et finissant le vingt-neuf septembre 1858, lesquels grains ont été transportés à la demeure principale du curé de la paroisse, pendant le carême de 1858, par les habitants de la paroisse ; que le curé de la paroisse de la Visitation de l'Ile-du-Pads, pendant la dite année ecclésiastique, pouvait être Messire Filiatrault ou tout autre prêtre, et que, de fait, Messire Filiatrault étant décédé le trente mars 1858, et le Défendeur lui ayant aussitôt succédé comme curé de la paroisse, la cure a été occupée et desservie, pendant la dite année ecclésiastique, moitié par Messire Filiatrault, et moitié par le Défendeur en cette cause, lequel est encore curé d'icelle paroisse ; qu'en conséquence le Demandeur, qui est aux droits des héritiers mobiliers du dit Messire Filiatrault ne peut réclamer que la moitié de la dîme de l'année commencée le vingt-neuf septembre 1857, et finissant le vingt-neuf septembre 1858, et que le Défendeur a droit d'avoir l'autre moitié ; et le Défendeur allègue, de plus, qu'après la mort du dit Messire Filiatrault, Paul Filiatrault, son père et son héritier mobilier, a partagé, par moitié, avec le Défendeur tous les grains de la dîme de la dite année, en prenant pour base de tel partage un certain livre ou cahier tenu par Paul Filiatrault, et dans lequel il avait entré ou fait entrer les grains de la dîme, et qu'avant le partage Paul Filiatrault, qui demeurait au presbytère de la paroisse de l'Ile-du-Pads, ainsi que sa femme, avec leur fils, Messire Filiatrault, et y a même demeuré quelque temps après la mort de ce dernier, avait pris, consommé, vendu ou autrement dépensé pour au moins la valeur $88.07 sur les grains de la dîme de l'année commençant le vingt-neuf septembre 1857, et finissant le vingt-neuf septembre 1858 ; qu'après le partage susmentionné, Paul Filiatrault s'est emparé et a disposé de la part des grains, à l'exception de sa part des dix minots d'orge qu'il a laissée au grenier du curé de la paroisse de l'Ile-du-Pads, lesquels y sont encore en entier et en nature, et que le Défendeur a toujours été et est encore prêt à livrer au Demandeur, et que la valeur de la moitié des dix minots d'orge est de trois dollars ; que le Défendeur n'a pas collecté de Pierre Plante la somme de $1.33 ; que les sommes

susmentionnées de $88.07 et $3 valeur de la moitié de dix minots d'orge, ajoutées à celle de $250.61 que le Demendeur reconnaît avoir reçue, ou qu'il doit recevoir, forment ensemble la somme totale de $343.68, laquelle dernière somme est la juste moitié du prix et valeur des grains susmentionnés formant la dîme de la paroisse de la Visitation de l'Ile-du-Pads. pour l'année ecclésiastique commençant à la Saint-Michel 1857 et finissant à la Saint-Michel 1858, laquelle dite moitié a été reçue comme susdit par Paul Filiatrault et le Demandeur, à l'exception de la moitié des dits minots d'orge qui a éte laissée au grenier du curé de la paroisse.

Le Demandeur répondit que la dîme d'une année est due et échue aussitôt après la récolte des grains sujets à la dîme ; que la dîme de l'année, une fois reçue par le curé desservant la paroisse, lui appartient exclusivement ; que le Défendeur, avant de venir desservir la paroisse de la Visitation de l'Ile-du-Pads, a dû nécessairement retirer la dîme dans la paroisse qu'il venait de quitter.

Le Défendeur produisit le document suivant : " Evêché de Montréal, 10 avril 1858 : Monsieur, par la présente, je vous charge de la desserte de la paroisse de la Visitation de l'Ile-du-Pads, où vous exercerez, jusqu'à révocation, les pouvoirs ordinaires aux curés de ce diocèse, avec le droit de percevoir les dîmes et oblations des fidèles de la dite paroisse. Vos pouvoirs sur votre nouveau bénéfice commenceront le dimanche du Bon-Pasteur, le dix-huit de ce mois. Je suis bien sincèrement votre très humble et obéissant serviteur, Ig., Ev, de Montréal."

Plusieurs témoins furent entendus, de la part du Défendeur, sur l'usage par rapport au partage de la dîme. Il appert, par les dépositions de ces témoins, que l'année ecclésiastique, sous le rapport de la dîme, se compte de la Saint-Michel à la Saint-Michel, est payable depuis les premiers battages jusqu'à Pâques, et que c'est la dîme de la récolte de l'année précédente ; qu'elle se partage entre curés au *pro rata* du temps de la desserte de chacun, et qu'un curé venant à mourir, par exemple au mois de mai d'une année, et ayant déjà perçu la dîme de la récolte précédente, sa succession serait obligée de restituer au curé successeur au *pro rata* du temps qu'il aurait à desservir jusqu'à la Saint-Michel suivante.

LAFRENAYE pour le Demandeur : Les bénéfices n'existent pas en ce pays, comme l'on peut s'en convaincre par la lecture du procès-verbal de l'ordonnance de 1667, titre 15, art. 1, Edits et Ord., 1 vol., p. 134, Ed. de 1803. Les successions des curés en Canada ne doivent donc pas être réglées par les dispositions du droit canonique, ou de cette partie de ce droit qui a trait aux droits bénéficiers. Par le droit civil, la succession des ecclésiastiques passe dans la personne de leurs parents ; car

l'article 336 de la coutume de Paris dit : " Les parents et lignagers des Evêques et autres gens d'Eglise séculiers, leur succèdent." Cet article fut rédigé spécialement pour rejeter la distinction apportée par les canonistes dans la transmission des biens ecclésiastiques. La dîme appartient exclusivement au curé par l'article 1 de l'Edit de 1679 ; en sorte que, du moment qu'elle est perçue, elle forme partie de son patrimoine.

RYAN, pour le Défendeur, cita : Lebrun, *Traité des successions*, liv. 2, chap. 7, sec. 4, des fruits par rapport au successeur à un bénéfice et aux héritiers du prédécesseur ; Durand de Maillane, *Dict. du droit canonique*, v° fruits ; et prétendit que, par le droit français et la jurisprudence, la dîme doit se partager au *prorata* du temps de la desserte de chaque curé ; que c'est la loi du pays, et qu'elle est aussi formelle qu'aucune autre loi sur la matière des successions.

BRUNEAU, J. : La défense que le Défendeur a opposée à cette action doit être maintenue. La dîme étant donnée aux curés pour la desserte des paroisses, doit nécessairement être repartie entre les différents curés qui peuvent se succéder dans le cours d'une même année dans une même paroisse. Sans cette répartition, il pourrait arriver qu'un curé qui n'aurait desservi une paroisse qu'au temps de Pâques, à l'échéance de la dîme, la recevrait tout entière pour quelques mois de desserte, tandis que les autres curés qui auraient été appelés à desservir ensuite cette même paroisse, durant cette année-là, avant et depuis lui, seraient obligés de le faire sans rémunération ; ce qui ne serait pas équitable, les habitants n'étant tenus qu'à la prestation d'une seule dîme par année, quel que soit le nombre des curés qui auraient desservi la paroisse durant l'année. Les lois ont nécessairement pourvu à ce cas, en faisant la répartition des fruits dépendants de la succession du bénéficier entre les héritiers et son successeur. Le Défendeur avait le droit de retenir sa part de la dîme sur les dîmes qui ont été apportées au presbytère, pour l'année ecclésiastique commençant à la Saint-Michel de l'année 1857 et finissant à la Saint-Michel de 1858.

En conséquence, l'action du Demandeur est renvoyée à l'exception d'une somme de 3s. 4d. pour 5 minots d'orge provenant de la dîme des années précédentes, restés dans le hangar. (4 *J.*, p. 10.)

LAFRENAYE et BRUNEAU, Avocats du Demandeur.

SENÉCAL et RYAN, Avocats du Défendeur.

PREUVE.—CONTRAT A L'ETRANGER.

COUR SUPÉRIEURE, Montréal, 30 novembre 1859.

Coram BERTHELOT, Juge-Assistant.

WILSON *vs.* PERRY, *et* PERRY, Tiers-Saisi.

Jugé : Que la preuve d'un contrat fait dans un pays étranger doit se faire devant nos tribunaux d'après la loi du pays où le contrat a été fait. (1)

Le Demandeur poursuivait le Défendeur pour la jouissance et occupation d'une terre située dans le Haut-Canada, et alléguait de plus une promesse de la part du Défendeur de payer la somme réclamée. Le Défendeur opposait une dénégation spéciale de tous les allégués du Demandeur. Un témoin fut examiné dans le Haut-Canada, sur commission rogatoire, et déposa des faits contenus dans la déclaration et, de plus, que, d'après les lois en force dans cette partie de la Province, la déposition d'un seul témoin *non contredite*, suffisait pour faire obtenir jugement au Demandeur sur une réclamation de la nature de celle en question en cette cause. Une admission fut aussi donnée par le Défendeur que telle était la loi du Haut-Canada. A l'argument, le Demandeur prétendit qu'ayant prouvé la loi du Haut-Canada, par l'admission qu'avait donnée le Défendeur, il n'était pas tenu de faire d'autre preuve que celle qu'il aurait eu à faire s'il eût porté son action devant une cour dans le Haut-Canada ; que, quoique généralement ce qui constitue la procédure proprement dite, doit se régler d'après les lois du pays où l'action est portée, il y avait une exception lorsque le fond même de la matière en litige dépendait de cette procédure, ce qui était le cas dans la cause actuelle ; qu'il fallait distinguer entre la forme de la preuve et la preuve elle-même, puisqu'en exigeant une preuve différente de celle du lieu où le contrat se fait, on fermerait la porte des tribunaux étrangers à ceux qui auraient intérêt à y porter leur demande, car il n'était pas à présumer qu'une partie contractant dans un pays s'entourerait de toutes les formalités auxquelles il pourrait être assujetti dans les différents autres pays où le hasard le forcerait à réclamer l'exécution de son contrat ; qu'enfin, le Demandeur ayant fait, d'après les formes voulues par notre système de procédure, la preuve qui, dans le Haut-Canada, lui aurait suffi pour obtenir juge-

(1) V. art. 7 C. C.

ment, il n'était tenu à rien de plus (1) Le Défendeur soutenait, au contraire, que la preuve était matière de procédure, et qu'en poursuivant dans le Bas-Canada, le Demandeur devait faire la preuve requise en pareil cas. Les raisons invoquées par le Demandeur prévalurent et le juge Berthelot, en prononçant le jugement, dit que cette cause devait être jugée d'après les lois françaises, et que là toutes les autorités étaient en faveur du Demandeur, mais qu'en Angleterre il y avait divergence d'opinions.

La Cour : " Considérant que les causes d'action qui font l'objet de la demande ont eu leur origine dans cette partie de la province appelée le Haut-Canada, où la dette qui fait l'objet de la demande est devenue due et exigible, et où le Défendeur s'est reconnu endetté et devoir au Demandeur, dans cette partie de la province appelée Haut-Canada, pour le loyer et l'occupation de l'immeuble désigné en la déclaration du Demandeur et qu'il y a preuve suffisante, d'après la loi d'icelle partie de la province appelée le Haut-Canada, que le Défendeur doit au Demandeur la somme de £75 pour l'usage et l'occupation du dit immeuble depuis le 1er mai 1851 au 1er mai 1856 ; considérant, de plus, que, par la loi du Bas-Canada, la forme probante des contrats ne doit dépendre que de la loi du lieu où ils sont passés et où la dette est devenue due ; a condamné et condamne le Défendeur à payer au Demandeur la somme de £75 avec intérêt." (4 *J*., p. 17.)

Jugement pour le Demandeur.

Cherrier, Dorion et Dorion, pour le Demandeur.

A. et W. Robertson, pour le Défendeur.

APPEAL.

Court of Queen's Bench, In Appeal,
Montreal, December, 1859.

Coram Sir L. H. LaFontaine, Bart., C. J., Aylwin, J., Duval, J., Meredith, J., and Mondelet, J.

Gould (Defendant in the court below), Appellant, *and* Sweet (Plaintiff in the court below), Respondent.

Held : An action in the Circuit Court for less than £25, becomes appealable, if the Defendant sets up title to real estate in his plea. (2)

(1) Bouhier, c. 21, § 205 ; Louet et Brodeau, *Lettre* 6, c. 42, n° 3, arrêt de 1596 ; Danty, *De la preuve*, ad. sur c. 1., n° 11 ; Guyot, *Rép.*, vo *Preuve*, p. 573-4-5-6 ; Boullenois, titre 4, c. 2, obs. 2, titre 2, p. 459 ; Pardessus, *Droit com.*, titre 5, n° 1490 ; Merlin, *Quest. de droit*, vo *mariage*, § 7, n° 1 ; Le même, *Rép.*, vo *preuve*, sect. 2, § 3, art. 1, n° 3 ; *Revue étrangère de législation*, titre 6, p. 796 ; Sirey, 1809-1-375-1813-2-310.

(2) V. art. 1142 C. P. C.

This was an appeal from a judgment rendered by a judge in vacation, under the Lessor and Lessee Act, maintaining an action for rent and in ejectment, instituted upon a lease for ten months, at a rent amounting in all to $50 for that period. Defendant pleaded that, on the day of and after the execution of the lease, Plaintiff agreed to sell to Defendant all his rights in the property leased, upon being paid $400 or *thereabouts*, and also upon Defendant paying to Hiram S. Foster, *(supposed to be the real* proprietor of the property) the value of the soil; that he was ready to perform these conditions and had a right to retain the property.

ABBOTT, for Respondent, moved to reject the appeal: Because the sum demanded, in the court below, did not exceed £25, nor did the action fall within the description of any other case susceptible of appeal. The sum demanded not being sufficient, the attempt to appeal must be based upon the supposition that Defendant has acquired the right to appeal by pleading as he has done. In that respect, it is submitted he is mistaken, for the law only gives it where this *suit or action* relates to title to real property, not where Defendant has chosen to involve title in his plea. If the latter construction were adopted, a Defendant could make any summary ejectment case appealable to the Queen's Bench, by simply pleading an imaginary title, without either the disposition or the power to prove it, thereby rendering entirely nugatory the limit as to amount, affixed to such appeals, by the construction of the act of 1857 now contended for.

DOHERTY, for Defendant, argued that the right of appeal to the Court of Queen's Bench existed under the act of 1857, in all cases falling within the description contained in the 60th section. An appeal was thereby given in all cases wherein questions arose respecting title to real estate. This was one of those cases, for, by the plea, Defendant claimed title in himself, to the real estate from which he was sought to be ejected by the action in the court below. It was thereby made a question in the cause, whether the real estate claimed by the action belonged to Plaintiff or to Defendant, and, therefore, it became absolutely impossible for the judge to decide the case without at the same time deciding in whom the title lay.

SIR LOUIS LAFONTAINE, C. J.: The court is of opinion that the action in the court below related to title of real estate. The motion is dismissed.

MONDELET, J., *dissentiens*: I am unable to consider as of any weight the pretension which I believe is entertained by some persons, that this court, as the highest court of civil jurisdiction in this province, has the right of entertaining appeals, entirely apart from any statutory provision to that

effect. I am clearly of opinion, on this point, that to permit of an appeal to this court, there must be some statutory enactment authorizing it, and that unless the present appeal be sustained by some such enactment it must be rejected. It, therefore, becomes necessary to examine the legislation on this subject. By the 12 Vict., cap. 38, § 53, there is granted "Appel à la Cour Supérieure, dans toute poursuite ou action "dans laquelle la somme d'argent ou la valeur de la chose "demandée excède £15 courants, si le jugement a été rendu "après la mise en vigeur de la loi, ou dans laquelle la somme "d'argent ou valeur de la chose demandée excède £10, et, si "le jugement a été rendu dans une poursuite ou action inten-"tée avant la dite époque, ou qui a rapport à des titres de "terre ou propriété foncière, ou à toute somme d'argent due "à Sa Majesté, honoraire d'office, rentes ou charges, revenus, "rentes annuelles, ou autres matières qui pourraient affecter "les droits futurs des individus." This action, it must be remarked, was instituted with *saisie-gagerie* for the recovery of $45, for rent of a lot of land under a lease for ten months, and of $5, for taxes and, also, in ejectment of Appellant by Respondent. By the 18th Vict., cap. 108, § 15, is enacted: "Il "y aura appel de tout jugement rendu dans une poursuite en "vertu du présent acte, dans la Cour de Circuit, à la Cour "Supérieure, et dans les poursuites intentées dans la Cour "Supérieure, à la Cour du Banc de la Reine, sous les mêmes "règles et aux mêmes conditions que les autres appels inter-"jetés des jugements des dites cours, que les dits jugements "soient rendus durant la vacance ou pendant le terme." By the Judicature Act of 1857 (20 Vict., cap. 44, § 59): "Les 53e, "54e, 55e et 56e sections de l'acte de 1849, cap. 38, sont, par "le présent, abrogées, excepté quant aux causes sujettes à "appel en Cour de Circuit, dans laquelle jugement aura été "rendu avant que cette section soit mise à effet, cause aux-"quelles les dites sections continueront de s'appliquer." Now the sum sued for does not exceed £15, and it does not fall under the words "ou qui aura rapport à des titres de terre ou propriétés foncières,"&c. (12 Vict., cap. 38, § 53), for the law only gives appeal where the "suit or action" *aura rapport*, etc. Now Defendant, by raising a question of title in his plea, clearly cannot change the nature of "the suit or action." Besides § 53, 54, 55 and 56 of 12 Vict., cap. 38, are repealed by 20 Vict., cap. 44, § 59. The appeal, therefore, created by the art of 1855, which depended upon those sections, as to the rules and conditions upon which it had existence, ceased with the repeal of those sections, and no provision having been made by the act of 1857, for any appeal from the Lessor and Lessee Act, there exists no appeal from that act to this court. Under ano-

ther view of the case, if the appeal granted by the Lessor and Lessee Act was not entirely destroyed by the repeal of the above mentioned sections of the act of 1849 and, if it survived that repeal in any form, it could only be in the form in which it was originally created: namely to the Superior Court; as no provision is to be found in the act of 1857, taking away the appeal granted by the act of 1855, either directly by repealing the clause conferring the right, or indirectly by creating a new tribunal in appeal for causes under that act. Under these circumstances, I cannot but feel a strong conviction that the present appeal ought to be dismissed, and the more I have reflected upon the matter, and examined it in its different aspects, the more thoroughly I am satisfied, that the view I have adopted is in strict conformity with the legal effect of the enactments on the subject. (4 *J.*, p. 18.)

DOHERTY, for Appellant.

ABBOTT and DORMAN, for Respondent.

MARINE INSURANCE.

SUPERIOR COURT, Montreal, 30th November, 1859.

Coram MONK, J.

THE SUN MUTUAL INSURANCE COMPANY *vs.* DAMASE MASSON *et al.*, and *E contra.*

Held: 1. On a demand for indemnity, under a policy of insurance against the perils of the sea, it is necessary to prove that the damage claimed for was caused by some peril insured against.

2. The mere fact that the goods insured were damaged to a trifling extent by salt water, does not constitute such proof.

3. A survey of goods alleged to be damaged, made without notice to the underwriter, followed by a sale at nine o'clock in the morning of the second day after the survey, at which sale the claimant bought in the goods, is irregular, and such proceedings afford no criterion of the extent of damage the goods have sustained. (1)

This was an action on a note, for $251.25, given for premiums of insurance to be earned, under an open marine policy. Defendants pleaded that the note was given for premiums to be earned under the policy in question, and that the premiums so earned only amounted to $71.98, which, with the price of the policy, amounted to $73.23. That, among the goods upon which the policy attached, there was a quantity of 30 bags of coffee, of which 7 bags, of the value of $161.33, were damaged, to the extent of 10 p. c., upon their value, and upwards. That a survey was duly held upon them, with the sanction of

(1) V. art. 1203 et 2507 C. C,

Plaintiffs, and that the coffee contained in them was afterwards sold by public auction, realizing only $22.92, shewing a balance of loss of $148.67, which, under the policy, Plaintiffs were bound to pay; and the conclusions of their plea claimed compensation. Defendants also fyled an incidental demand, based upon the alleged loss, claiming the difference between the earned premiums, and the alleged loss. Plaintiffs replied that the alleged damage was not caused by any peril insured against and, moreover, was not one for which they were liable under the policy in question; that the survey and sale referred to in the plea were irregular, illegal and collusive, and were contrived by Defendants fraudulently to enable them to acquire the coffee at the expense of Plaintiffs, on the pretence of damage which did not exist. The policy was admitted, and it appeared, by its provisions, that every $300 in order of invoice was to be considered separately insured, while, amongst other things, coffee was declared free of average under ten per cent., unless general. By the evidence, it appeared that the company's surveyor estimated the damage at less than five per cent. on the value of the 7 bags coffee, and reported the loss as insufficient to warrant a claim under the policy; that their agent, Hart, had, on an application to that effect, himself concurred in the opinion of the surveyor, but had told Defendants that, if not satisfied, they might call a survey at which the company's surveyor would attend, and that they might have the coffee sold, if so ordered under the survey; that, on the 27th of July, Defendants had called a survey, but without any notice to Plaintiffs, or their agent, and the surveyors they named, having declared the 7 bags of coffee to be damaged in excess of ten per cent., it had been sold for the price mentioned in the plea, at nine o'clock, on the morning of the 29th of July, after advertisement in two newspapers; that it had been bought nominally by Mr. Marchand, but really bought in by him for Defendants, at a very small price, he having been requested before the sale to purchase it for them; that, on the day of the sale, Mr. Shelton applied to purchase the coffee as damaged, but could not come to terms with Defendants, they asserting that the coffee was not materially injured or lessened in value; that, also, on the day of the sale, having heard of it after its occurrence, Hart wrote to Defendants offering, on behalf of Plaintiffs, to take the damaged coffee at prime costs and charges, which was refused, and that, in fact, the damage consisted in the injury caused to two or three pounds in each bag of the coffee by a dripping or drop of some liquid upon it (the evidence whether this liquid was salt water or not being conflicting) which had discolored a spot on each bag, of about three inches in diameter, and had

injured the coffee lying in immediate contact with the spot discolored; and that it was of a very trivial character.

ABBOTT, for Plaintiffs, argued that Plaintiffs were not liable for any loss upon the coffee: 1st Because it had not been shewn that the loss had occurred by any of the perils insured against and, 2nd because the loss actually sustained did not amount to a claim, in consequence of the limit contained in the memorandum. It was a mistake to suppose that the mere fact of goods being injured, on the voyage over sea was sufficient to hold the underwriters for such injury, without any proof that it was caused by a peril of the sea. The contract was one of indemnity against loss from certain causes. If parties pretended that loss had occurred from those certain causes, it was for them to show it, either by a necessary deduction from the nature of the injury, or by substantive evidence. Here, no proof of the cause of loss could be deduced from the injury itself, or was attempted to be otherwise made. Supposing it to be proved that the damage was caused by salt water (which it certainly was not), it was infinitely more like a damage caused by washing a leaky deck, than by the force of the winds or waves. If the damage arose from the second, they might at least have shewn that the ship had met with stress of weather, but they had not attempted to do so. The authorities on this point are clear. " The insurers only " stipulate to make indemnity for the *extraordinary* con- " sequences of the *unusual* and *extraordinary* operation " of those perils. " (of the seas), 1 Phillips, nº 1099, p. 649. Even if the ship be proved seaworthy at the beginning of the voyage, and is injured during the voyage, still " the " burden of proof is on the assured otherwise to prove the damage to have been the effect of the *extraordinary* opera- " tion of the perils insured against," 2 Phillips, p. 697 ; 2 Summer, p. 366. The best French writers concur in this view ; 1 Laget de Podio, p. 412 ; Delaborde, *Avaries sur marchandises*, pp. 49 et seq., defines the perils of the sea to be " *des cas fortuits ou d'événements de force majeure :* and, at pages 218, 221, he lays down the rule that the burden of proof is on the claimant, and that he must shew what the accident was which caused the damage. Stephens, adopting the substance of the definition of a very able judge, says : " Losses by the pe- " rils of the sea are restricted to such accidents or misfor- " tunes only as arise *ex vi divinâ* from stress of weather, " winds and waves, from tempests, rocks and sands ;" 3 Ste- " phens, N. P., 2149, and both American and English authori- " ties agree with Delaborde as to the burden of proof ; 2 Greenleaf, § 385 ; 1 Starkie, 137; 5 L. Ann. Rep., p. 706. See also upon all these points, 2 Arnould, *on Ins.*, pp. 793, 801,

1273, 1338, *et in notis;* Emerigon, pp. 286 et seq. In this case, there is not even proof that the damage was from salt water, and there has been no attempt to show in what way it occurred, or that it arose in any way from any of the causes which alone could have given rise to a claim on the underwriters. But were the damage proved to have been caused by one of the perils insured against, it did not amount to enough to entitle Defendants to claim from the company. Three modes had been adopted for testing the amount of damage; 1st by a survey; 2nd by a sale by auction, and 3rd by the testimony of persons who have examined it. It must be borne in mind that each $300 in order of invoice was to be considered as separately insured, and that coffee was warranted free of average under 10 p. c. unless general. The seven bags of coffee were of the value of $160, and formed part of a lot of 30 bags, of four times that value. The surveyors reported *these seven bags* to be damaged to the extent of ten per cent, which was clearly insufficient, as, under the most favorable construction of the policy, they ought to have been damaged to the extent of $30, or about 19 p. c. on their value, to entitle Defendants to claim; while treating the lot as being separately insured, they would require to be damage to the extent of 40 p. c. of their value to create a claim. Under the survey, then, there was clearly no claim, totally irrespective of its irregularity, as having been called and held without notice to Plaintiffs. The sale by auction was no criterion of loss under the circumstances. It was very slightly advertised, was held at an unusually early hour, and the coffee was adjudged to Defendant himself. Had it been *bonâ fide* sold to a third party, there might have been a question, but, as it was, the facts fully bore out Plaintiffs' answer to Defendant's plea. Defendants procured their own surveyors, held an *ex parte* survey, by which they imagined the coffee was condemned, they procure their own auctioneer by whom the coffee was sold, in the morning, at the extreme verge of business hours, and little more than 36 hours after the survey, and they procured a friend of their own, to attend and buy it, ostensibly for himself, but, really, for them, within one hour afterwards refusing to sell the coffee as damaged, and refusing to take costs and charges for it from Plaintiffs. Under these circumstances, no weight whatever could be attached to the sale, as a criterion of damage, and the facts fully sustained the manner in which the whole transaction was characterised in Plaintiffs' answer. The evidence of witnesses, as a criterion of damage, was all in favor of Plaintiffs. No witness for Defendants attempted to make out that the seven bags were damaged to an extent exceeding ten per cent upon their total value, while those of Plaintiffs,

and among them Shelton, who attempted to buy the coffee of Masson, within an hour of its sale by auction, prove it to have been of the most trivial character. By none of the three tests, then, was Defendants' position sustained. The fact was that it had long been the custom, among many persons in trade, in Montreal, to treat underwriters as fair game. The slightest injury to goods was seized upon as a pretence for a claim; a survey was called of persons who were the more easily satisfied, of the extent of the damage, from having frequently occasion for the services of the assured for a similar purpose. The goods were condemned, sold, bought in, under a *prête nom*, claimant, for a song, and the whole affair placed beyond the possibility of investigation, long before the insurer could even hear of the transaction, and, thus, the importer stocked his shelves and his cellars at the expense of the underwriter. This was notoriously true, and the sooner for the credit of the city and the benefit of the honest trader, such practices were put a stop to the better.

MORIN, for Defendant and incidental Plaintiffs, contended that the evidence was sufficient to shew that the damage was caused by salt water, one of the witnesses having tasted the damaged coffee, and being, therefore, competent to speak as to that fact. If, then, it was so damaged, the presumption that it was from a peril of the sea followed as a matter of course. If Plaintiffs contended that salt water had come in contact with the coffee, otherwise than by a peril insured against, it was for them to shew it. If further proof than the actual injury were required of the insured, they might suffer great injustice, and be placed at the mercy of the crew of the ship, who would be the only persons competent to testify as to the accident, and might be indisposed to give fair testimony, or might be thousands of miles away when it was required. He urged, therefore, that, having shewn that the injury arose from contact with salt water, his case to that extent was made out. As to the mode of estimating the damage, Defendants had followed the instructions of Plaintiffs' agent. He had told Defendants that, if they were discontented with the report of Plaintiffs' surveyor, they might call a survey and sell the goods, and they had done so. Though possibly Hart might not have known the precise time at which the survey was to be held, still he knew it was to take place, and could have ascertained the time, if he had thought proper. As to the sale, the pretensions of Plaintiffs were wholly unfounded. If the court would read the deposition of Marchand, the auctioneer, they would be convinced that he had followed the regular course of trade, by causing the sale to be properly advertised, and had made it as public as pos-

sible, by the distribution of hand bills, and by posting them upon the door posts of Defendants' store, where the sale had taken place. He had sworn in the most positive manner, as his deposition would shew, that there had been no collusion or improper practice in relation to the sale, that there were several persons present at it, and that he had several bids.

MONK, J.: There can be no doubt but that the thirty bags of coffee mentioned in the plea, and valued in the policy at $654, were covered by the policy, that any damage arising from perils of the sea exceeding ten per cent, upon the lot, would establish a claim upon the underwriters. It is equally beyond doubt that seven bags of the thirty were damaged. But, upon these facts, two important questions arise. 1st Were these seven bags of coffee damaged by one of the perils insured against, and if so: 2nd Did the damage amount to ten per cent, upon the value of the whole thirty bags? Upon the first point, the evidence is conflicting. It is not even conclusively established that the damage was caused by salt water. I find no testimony to show that the damage was caused by a peril of the sea; in other words, by one of the perils or risks insured against. The damage may indeed have been caused by salt water, but it is not shown that it was by a peril of the sea, and in the absence of such proof the court will not presume it to be so. This however is not very material, because upon the second point, it is proved that the special damage done to the seven bags of coffee did not exceed or very slightly exceeded ten per cent. upon the value of the quantity damaged. The survey and sale were not very regular and, under the circumstances, the sale cannot be regarded as any criterion of the extent of damage. I should not however characterize the survey and sale as fraudulent; but this again is not material. The surveyors prove the damage to be something over ten per cent. upon the value of the seven bags, and if we are to take their evidence as conclusive, it precludes Defendants from recovering from the insurers under the policy, as the loss should have exceeded ten per cent upon the whole lot valued at six hundred and fifty-four dollars. Judgment, therefore, must go for Plaintiffs, for seventy-three dollars, twenty-three cents.

ABBOTT and DORMAN, for Plaintiffs.
OUIMET and MORIN, for Defendants.

FACTEUR.—GAGE.—REVENDICATION.—AGENT.

SUPERIOR COURT, Montreal, 30th September, 1859.

Coram BADGLEY, J.

CLARK *vs.* LOMER, and CLARK *et al.*, Plaintiffs *par reprise.*

Held : 1st. That the proprietor of goods cannot claim them by revendication as his property, while they are in the hands of a party having a lien upon them for advances made to a third party, from whom the party in possession had received them.

2nd. That a lien for advances is good, as against the owner of goods, under the Statute 10 & 11 Vict., c. 10, s. 4, when made for the pledger's own private purposes, or to carry out a contract between pledger and pledgee, although the pledgee knows of the ownership not being in the pledgee, so long as the pledgee has not notice from the owner that the pledger had no authority to pledge.

3rd. That, under 10 & 11 Vict., c. 10, s. 4, knowledge by the pledgee that the pledger was not the owner does not make him *malâ fide*, as regards the owner in advances made on the goods by pledgee to pledger, for private purposes of the pledger, or to carry out a contract between pledgee and pledger, so long as the pledgee is without notice that the pledger had no authority from the owner to pledge the goods.

4th. That the lien is not extinguished by the pledgee transferring to a third party, for value, negotiable notes which he had taken for the advances, if the notes came back again into the pledgee's hands, in consequence of not being paid at maturity. (1)

Plaintiff instituted this action by an attachment, *saisie-revendication*, against five cases of mitts and gloves, which he alleged to be his property, and detained by Defendant, and to be of the value of £500. Defendant met the demand by two pleas. By the first, he alleged that he had received the five cases of mitts and gloves, in good faith, from Erastus Thrall, as security for advances of money made the latter, to the amount of £400 and upwards, for which he held the notes of Thrall, the first of said notes being alleged to have been made among other things, for custom duties paid by Defendant on said goods, and he prayed that, in the event of Plaintiff establishing a right of proprietorship in the cases of mitts and gloves, he should only get delivery of them on payment of the claim of Defendant. Plaintiff answered Defendant's first plea by alleging that Defendant received the goods in bad faith from Thrall, knowing the same to be the goods and property of Plaintiff, and, in receiving said goods and making advances on them, was acting *malâ fide*, as regards Plaintiff; and Defendant then had notice that Thrall, making such contracts as alleged in his plea, had no authority to make the same, and was acting *malâ fide*, in respect thereof against Plaintiff, as owner of said goods, especially as Thrall pledged

(1) V. art. 1740 C. C.

the goods for his own private purposes, without the consent and knowledge of the owner thereof, as Defendant well knew, and the goods were pledged by fraud and collusion between Defendant and Thrall, with an intent to defraud Plaintiff; that the notes given by Thrall, as mentioned in Defendant's pleas, were by Defendant transferred, for value, to certain persons named in said answer, and the lien alleged by Defendant to have been created by Thrall, on said goods, was then immediately extinguished and discharged. By a second answer, Plaintiff alleged that Defendant had no lien for the first note, for £76 5s. 3d.; that Defendant promised a lien under an agreement of date 26th March, 1857, and for no more than $1000; that Thrall had, prior to 1st August, 1857, deposited with Defendant skins of the value of $1016.68, which Defendant had converted to his own use, and Plaintiff, therefore, had a right to compensate the value of said furs with the amount of Defendant's lien.

Badgley, J.: This is an attachment by revendication, at Plaintiff's suit, of five cases of gloves and mitts in the possession of Defendant. It appears that Plaintiff, resident in the state of New-York, intrusted and consigned these goods to one Thrall, for sale at Montreal, where, upon their arrival, they were seized by the customs, for short valuation, and detained some months by the custom's authorities. They were, however, finally admitted to entry upon their proper appraised value, through the exertions of R. H. Hamilton, in Plaintiff's interest. Thrall, without intimation to Defendant of Clark's interest or property in the goods, obtained from Defendant advances to pay the duties and the expenses incurred upon the goods, amounting to £76 5s. 3d., the duties being paid by Defendant's check, handed to Hamilton for the purpose, with which, and, thereupon, with Thrall's order, the goods were transferred from the customs' warehouse into the store of Defendant. At this time, the season for the sale of such furs had passed away, but within two or three days after their delivery to Defendant, he entered into a contract with Thrall, which were to be realized for the payment of the advances, upon certain terms of commission and interest stipulated in the contract, according as the sales should be made by Defendant, or by Thrall himself. As security for these advances, the latter pledged the goods above mentioned to Defendant, who, at once, made advances and continued to do so, for some time afterwards, until a large quantity of furs had been collected, which, having remained on hand a long time undisposed of, Defendant finally ordered to be realized by public auction, in order to settle the account; but it is alleged, that this was done without Thrall's directions, and in an

irregular manner. A large balance remained against Thrall, even after this transaction, for the security of which Defendant claims to hold the goods, under the Factor's Act, 10 and 11 Vict., ch. 10. Without, at present, adverting to the point raised respecting the alleged unauthorised sale, the chief point for present consideration are the pledge of the goods to Defendant, and his right to hold them for the balance of his advances upon them. Plaintiff's property in the goods and Thrall's agency and consignment are established, but the proof in no way implicates the Defendant's good faith in his contract with Thrall, or impeaches his ignorance of Thrall's not being the owner of the goods, both of which points are put in issue by Plaintiff. The pretensions of Defendant rest upon the statute which was made up and collected together from the three several British Statutes, *in pari materia*, and may, therefore, be fitly expounded by reference to British authorities. It is admitted that the Statute law, in this respect, is at variance with the letter of the rule: *nemo plus juris in alium transferre potest quam ipse habet.* The reasons and motives for the positive departure from this just and equitable legal principle are to be found in the exigencies and necessities of trade and commerce. Previous to such statutory legislation, a broker, employed to purchased, had, as such, no authority to sell, and his principal might repudiate any contract entered into by him beyond the scope of the authority of that class of agents, and reclaim his goods into whatever hands they had come, unless, 1st It were a *bonâ fide* sale on market, overt, which the policy of the law never allowed to be disturbed; or, 2nd Where the principal himself had allowed the broker to mislead the party to whom the transfer had been made, by enabling him to appear in the character of owner. A factor had, as incident to his character as factor, a right to sell, but he might not dispose of his principal's property in any other manner, whether by barter, pledge, &c., and, if he did so, the principal might follow the property of the proceeds, so long as they could be specifically traced, and recover them absolutely and free of all charges; for the transferree could not claim in right of the factor, nor in his own right, lien being a personal and intransferable right, because the possession out of which the lien must arise was, as against the owner, a tortious or wrongful possession. This rule could not be evaded by a colourable sale, the true nature of the transaction was looked into by the court and adjudged upon accordingly. The reason was that persons engaged in mercantile transactions must be presumed to know what contracts are within the limits of the general authority of a factor or broker, and, therefore, before entering into a contract which was not of

this character, they were bound to inquire into the real authority of the person with whom they were about to contract. It may be added that it was immaterial whether the pledgee knew he was treating with a factor or whether he acted under a *bonâ fide* impression that the holder of the goods was himself the real owner. The rigid adherence to these rules by the courts, notwithstanding the apparent hardship of particular cases, gave rise to loud complaints among mercantile men and even by some of the judges themselves, when finally, by the exertions of the moneyed capitalists, whose interest were most affected by the then state of the law, the 4 Geo. IV, ch. 83, was passed, which, after a trial of two years was embodied in the 6 Geo. IV, ch. 94, and which latter was subsequently amended by the 5 and 6 Vict., ch. 39, all in connection with and for the regulation of this particular subject. However, questionable might be the policy of some of these provisions, they have remained unaltered and have been introduced into the legislation of several of the American States, and also, in 1847, were made the law of Canada, by the act 10 and 11 Vict., ch. 10. With reference to this last act, it is sufficient to observe that it is a compendium of the british statutes. The main provisions of our statute, which apply in this case, are the following : 2nd sect." That any such " agent, intrusted with the possession of goods and merchan-" dizes, shall be deemed and taken to be the owner of such " goods, &c., so as to entitle the consignee of such goods, &c., " to a lien thereon, in respect of any money advanced by such " consignee to and for the use of such agent, to all intents and " in like manner as if such person were the true owner of " such goods, &c., and, so far as to give validity to any con-" tract or agreement, by way of pledge, lien, or security *bona* " *fide* made by any person with such agent so intrusted, &c., " as well for any original loan upon the security of such " goods, &c., as also for any further or continuing advance in " respect thereof, and such contract shall be binding upon " the owner of the goods, &c., notwithstanding notice of " agency." And 4th section provided, &c. The act to be deemed to give validity to such contracts only as are mentioned in this act, and to protect only such loans as " shall be made *bona* " *fide* and without notice that the agent making such contract " has no authority to make the same or is acting *malâ fide*, in " respect thereof, against the owner of such goods." The legislative history of the british statutes and the motives which gave occasion for their existence will not be examined at lenght upon this occasion, as every particular in this respect is amply and fully detailed and explained, and will be found in Story, *on contracts*, § 363, and note 3 *in extenso* ; in

Dunlap's Paley's *Agency*, ch. 3, part. 1, § 6 *in extenso;* Parsons, *on contracts*, pp. 79, 80; Russell, *on factors*, pp. 87, 88; and in the latest edition, in 1858, of Addison, *on contracts*, pp. 318, 319, 320, 321, 322. After stating the strictness of the old rule, this last author sets out the modifications introduced by the british statutes, and, after commenting upon them, concludes in the following terms: " Although, therefore, the owner of " goods who intrusts them to a factor to sell expressly pro- " hibits the factor from pledging them, the prohibition will " be of no avail against a pledgee who has received the goods " in pledge from the factor, knowing that he was an agent " for sale, but non knowing that he had been prohibited from " pledging them." You may, under this act, treat any agent whom you known to be so, as owner, in accepting any pledge from him, although you know the goods have been intrusted to him to sell, provided that you have not notice that the agent is acting *malâ fide* and disobeying his instructions. It may be observed that the present jurisprudence is in conformity with the modern law of France, and of all the states of Europe, and, with that of the United States, which have adopted a legislation similar to that of England, nor was it opposed to the old law of France, see Pothier, *Nantissement*, n° 27; Basnage, *Des hypothèques*, pp. 4, 6. The exposition of the law applicable to this case has been thus far confined to the opinions of the text writers upon the subject, without reference to reported cases, which, however, are referred to by those authors, but, before clausing my remarks, it is desirable to cite recent case at some length, as it is conclusive, as well as instructive of the matter involved in this contestation. The case is *Navelshaw* vs. *Brownrigg*, 16 Jur. 897; 13 Eng. C. L. & Eq. Rep., on appeal, in 1852, in which the Lord Chancellor, Lord St. Leonards, rendered the following judgment. He introduced the case as one of great mercantile importance and as dependent upon the construction of statutes. He stated the rigidity of the common law, which prevented dealing, in England, by way of pledge of goods committed to an agent, without express authority to him to pledge. He observed that, to meet this inconvenience, the statutes (naming them) had been passed; that, by 4 Geo. IV, ch. 83, the pledgee only acquired the right of the pledger; then, by the 6 Geo. IV, c. 94, 1st, the agent, as regarded third persons, was enabled to sell or to pledge, provided the pledgee did not know that he, the pledger, was not the actual and *bonâ fide* owner of the property, operating in the case of a person who was dealing with an agent, not knowing him to be such, apparently as owner. And 2nd, enabling a person to contract with any agent intrusted with goods, or any consignee of them for the pur-

chase of them, and to receive and pay for them, validating the contract against the owner, if that and the payment were made in the usual and ordinary course of business, and without notice at the time that such agent was not authorized to sell the goods and receive the purchase money." Here, although "you are dealing with an agent, if you do not know that he "has not authority to sell, you are perfectly safe in buying. "As the law stands, any one may safely buy of an agent, if "he does not know, and it is absolutely necessary that he "should not, that the agent is not authorized to sell; and, if "the person selling is known to be an agent, then the law "gives to persons accepting goods in pledge from known "agents, the interests of the person who makes the pledge." The 6 Geo. IV related only to purchases and pledges from agents known to be such, and to sales by agents who had not authority to sell. The 5 and 6 Vict., ch. 39, repaired the omissions by validating against owner any contract of pledge, lien, &c., *bonâ fide* made with an agent in possession of goods or documents of title, as well for any original loan advanced, or for continuing advance, &c., notwithstanding the person claiming such pledge or lien might have had notice that the person with whom such contract or agreement was only an agent. "The act says that in dealing with any agent, in the pledge "of property, you may safely consider him as owner, if you "are acting *bonâ fide*, though you know he is the agent, and "you are not bound to ask for his authority. It is the usual "course of business to take for granted that he has authority, "and, if you do not know he has not authority, you are per-"fectly safe: he shall be deemed the owner of the property, "and you may deal with him as such, provided you are act-"ing *bonâ fide*, though you know he is the agent, you may deal with him as the owner." The proviso then follows upon which every thing turns, and sustains the interpretation above given: "You may, therefore, treat any agent whom you know "to be so, as owner, in accepting any pledge of goods from "him which you know to have been deposited with or trans-"mitted to him as agent, if you are acting *bonâ fide*, and have "not notice that he is making the contract either *malâ fide* or "beyond his authority. It is presumed it will be in the ordi-"nary course of business." The observations of the lord chancellor, upon the three english statutes, considered together apply to our statute, containing in itself similar provisions, and must necessarily operate against Plaintiff's pretensions, in matter of law, whilst, as to matter of fact, Defendant is free from *mala fide*, and was without any notice that could bring him within the exception of the statute.

JUDGMENT: The court, considering that the goods attached

by Plaintiff, under process of *revendication*, were, at the seizure thereof, legally in Defendant's possession, and by him legally held in pledge, and under *lien* and *gage* for the repayment to him of advances in money made thereon, and by reason thereof, as already so adjudged and ordered, by a judgment in this cause rendered, on the thirtieth day of June last by the said court. And, further, considering that at the date of said seizure, there was due and owing to Defendant, for the advances aforesaid, and for the necessary expenses of keeping said goods and which still remain due to Defendant, a sum exceeding the sum of four hundred pounds, and that, neither Plaintiff, nor Plaintiffs *par reprise d'instance*, have repaid any part of said sum, or tendered or offered to repay the same, to Defendant, doth dismiss this action." (4 *J.*, p. 30.)

TORRANCE and MORRIS, for Plaintiffs.

DAY and CRAMP, for Defendant.

PLEDGE.—FACTOR.

COURT OF QUEEN'S BENCH, IN APPEAL, Montreal, 1st June, 1861.

Coram Sir L. H. LAFONTAINE, Bart., Ch. J. AYLWIN, J., DUVAL, J., MEREDITH J., MONDELET (C.), A. J.

SARAH JOHNSON et al. (Plaintiffs *par reprise d'instance* in the court below), Appellants, *and* GERHARD LOMER (Defendant in the court below), Respondent.

Held : 1st. That the proprietor of goods cannot claim them by revendication as his property, while they are in the hands of a party having a *lien* upon them, for advances made to a third party from whom the party in possession had received them.

2nd. That a *lien* for advances is good as against the owner of goods under the satute 10 and 11 Vict., ch. 10, s. 4, when made for the pledger's own private purposes, or to carry out a contract between pledger and pledgee, although the pledgee knows of the ownership not being in the pledger, so long as the pledger has not notice from the owner that the pledger has no authority to pledge.

3rd. That, under 10 and 11 Vict., ch. 10, s. 4, knowledge by the pledgee that the pledger was not the owner, does not make him *malâ fide*, as regards the owner, in advances made on the goods by pledgee to pledger, for private purposes of the pledger, or to carry out a contract between pledgee and pledger, so long as the pledgee is without notice that the pledger had no authority from the owner to pledge the goods.

4th. That the *lien* is not extinguished by the pledgee transferring to a third party, for value, negotiable notes which he had taken for the advances, if the notes came back again into the pledgee's hands, in consequence of not being paid at maturity.

This was an appeal from a judgment of the Superior Court at Montreal. The facts of the original case will be found

reported *supra*, p. 76. The judgment of the court below was affirmed. In rendering judgment, the chief-justice remarked. Le Demandeur a fait émaner une *saisie en revendication*, à l'effet de revendiquer une certaine quantité de gants et de mitaines qui lui appartenaient, mais qui se trouvaient en la possession du Défendeur ; ils avaient été donnés en gages à ce dernier, par le nommé Erastus Thrall, l'agent ou facteur du Demandeur, et ce pour des avances de deniers que le Défendeur avait faites à cet agent. Le Demandeur est prouvé être le propriétaire. Mais Thrall pouvait-il valablement donner ces marchandises en gage, comme il l'a fait, et le Défendeur a-t-il le droit de les retenir ? c'est là la question.

Le juge de première instance a décidé la question au profit du Défendeur, en se fondant sur notre statut de 1847, ch. 10. Je concours dans l'interprétation que l'honorable Juge Badgley a donnée au statut, non pas parce que cette nouvelle loi ayant été en quelque sorte empruntée à des statuts anglais, elle doive être déterminée d'après des arrêts de tribunaux anglais, mais bien parce que les règles d'interprétation du droid français, qui est celui du Bas-Canada, permettent de donner à notre statut provincial le sens que Monsieur le Juge Badgley lui a donné dans la cour de première instance. Le Demandeur a prétendu que le Défendeur avait été coupable de mauvaise foi, et que, par conséquent, il n'était pas protégé par le statut. Les faits prouvés au dossier ne justifient pas, à mon avis, cette prétention. Le reproche de mauvaise foi pouvait peut-être s'adresser à Thrall, mais non pas au Défendeur. Judgment confirmed. (6 *J.*, p. 77.)

TORRANCE and MORRIS, for Appellants.
DAY and DAY, for Respondent.

SOCIETE.—ACTION PRO SOCIO.—INSCRIPTION.

COUR SUPÉRIEURE, Montréal, 31 décembre 1859.

Coram MONK, J

THURBER *vs.* PILON.

Juge : Qu'un associé n'a pas d'action d'assumpsit contre son ci-devant coassocié, pour dettes prétendues être dues ou argent retiré du fonds social, lorsqu'il y a eu dissolution de société entre eux ; dans l'espèce, le transport fait par Pilon à Thurber ne donne pas droit d'action à ce dernier.

2° La cour jugera le mérite de l'action sur une inscription pour audition sur une première exception péremptoire.

Le 2 décembre 1852 le Demandeur et le Défendeur contractent une société commerciale, ensemble, sous le nom de

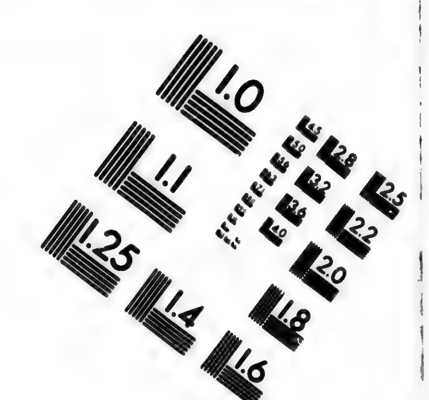
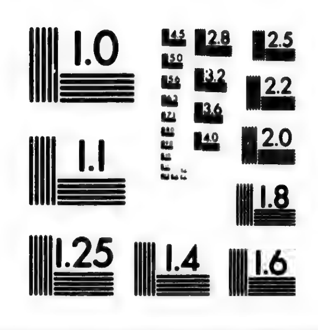
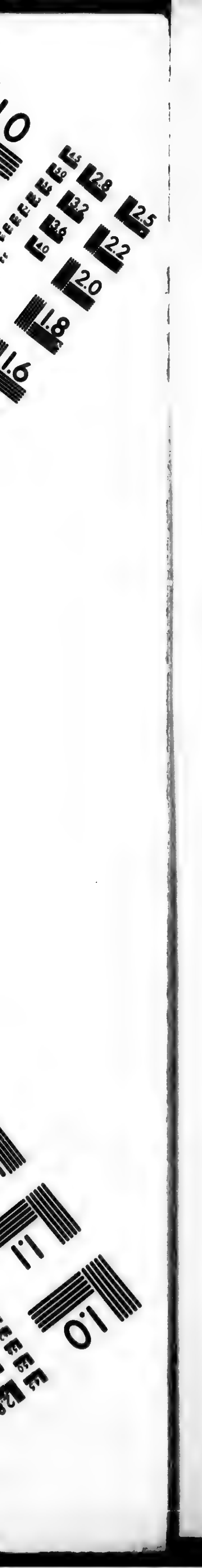


IMAGE EVALUATION TEST TARGET (MT-3)



6"


2.8
2.5
3.2
2.2
3.6
4.0
2.0
1.8
1.6
1.1
1.0

Thurber et Pilon, et ce, par moitié entre eux. La société exista jusqu'en juin, 1855. Le 1[er] juin 1858 la société fut dissoute par acte notarié. Thurber s'obligeait de payer les créanciers de la société, et restait seul propriétaire des fonds de la société. Pilon céda à Thurber tous ses droits, titres et intérêts dans la société, et autorisait Thurber de poursuivre, de collecter et de recouvrer, soit au nom de la société, soit en son nom propre, toutes dettes, propriétés et effets appartenant à la société. Dans sa déclaration, le Demandeur allègue, que Pilon est endetté envers la société et une somme de £1251, pour argents perçus dont il n'a pas rendu compte, ou argents qu'il s'est appropriés pour acheter des propriétés, ou qu'il n'a pas entré dans les livres de la société, ou dont il n'a pas encore rendu compte. Les conclusions de l'action sont à l'effet de demander une condamnation personnelle contre le Défendeur. Le Défendeur a plaidé: 1° une exception péremptoire, dans laquelle il allègue, que, par l'acte de dissolution de société du 1er juin 1855, Thurber s'est obligé de supporter les pertes de la société, indemniser et décharger Pilon (and save harmless the said Pilon) des dettes dues par la société aux créanciers d'icelle, et aussi de toutes autres réclamations quelconques ; que le Demandeur ne peut poursuivre Pilon, sans demander la nullité de cet acte de dissolution, et que l'action devait être l'action *pro socio*, pour forcer Pilon à rendre compte ; 2° une autre exception péremptoire répétant les mêmes moyens, et, de plus, que Pilon ne devait pas ce qui lui était demandé.

Le Demandeur répondit que, par le transport à lui fait, par l'acte de dissolution, il a droit d'action contre Pilon, comme cessionnaire de ce dernier. Le Défendeur inscrivit la cause pour audition au mérite sur l'exception en premier lieu plaidée par le Défendeur, et cela de consentement.

Per Curiam : Le Demandeur n'a reçu aucune cession du Défendeur, et celui-ci ne lui a fait aucun transport de droits contre lui. Le Demandeur devait demander à ce que les parties fussent remises dans le même et semblable état qu'elles étaient avant l'acte de dissolution. Le Demandeur ne peut exiger du Défendeur les sommes qu'il réclame de la manière qu'il le fait par son action. Par la déclaration, le Demandeur se plaint que le Défendeur ne lui a pas rendu compte ; alors il faudrait une action à l'effet de lui faire rendre compte. Action déboutée. (4 *J.*, p. 37.)

L. V. Sicotte, pour le Demandeur.

Ouimet et Morin, pour le Défendeur.

Note.—Pendant le délibéré, il fut signalé que la cause n'étant inscrite pour audition au mérite, que sur la première exception péremptoire, le jugement ne pouvait être rendu, car il fallait inscrire la cause sur le tout ; mais la Cour a considéré l'inscription valable, telle que faite.

CARRIER.—LIABILITY.

CIRCUIT COURT, Montreal, 12th December, 1859.

Coram BERTHELOT, J.

HARRIS et al. *vs.* EDMONSTONE et al.

Held: That the clause in a bill of lading that carrier is "not liable for leakage, breakage and rust," does not relieve the carrier from liability arising from negligence, and he is bound to show that there was no negligence on his board.

This was an action to recover of Defendants, owners of the steamer "Indian," damages which Plaintiffs, merchants at Toronto, had suffered, by the breakage of an iron boiler, lined with enamel, and intended for the boiling of acids, which had been imported in October, 1857, under a bill of lading, signed at Liverpool, undertaking to deliver at Montreal. Defendants set up various grounds of defence, alleging that, if the boiler were broken, it was not by their negligence, but from causes and accidents for which they were not liable; that they took all proper care, and used all proper diligence, but the main reason set up by them was that, by the express agreement alleged to be contained in the bill of lading, they were not bound for breakage. The bill of lading contained the following clause, "not liable for leakage, breakage and rust." The facts, as developed in the evidence, were, that the boiler was landed in Montreal in a damaged condition, from one board a barge of Defendants, into which they had themselves transhipped it. On being landed on the wharf, the attention of the master of the barge was called, by the party acting for Plaintiffs' shipping agents, to the fact that a piece of the exit pipe was broken off, and, thereupon, he brought the broken piece from the barge, stating that he had received it broken from the ship. On after-examination, when the cover of the boiler was taken off, the enamel inside was found to be broken on the inside, apparently from the effects of a heavy blow upon the outside of the boiler, so that it was rendered totally useless for the purpose for which it was intended; and, being sold at auction, after the usual proceedings, it brought a mere trifle. Evidence having been adduced on the part of Plaintiffs, Defendants not adducing any evidence, the parties were heard and judgment was rendered on the 12th day of December, 1859, maintaining Plaintiffs' action. The following is the substance of the remarks of the learned judge who gave judgment: Action pour £21 13s. 9d., balance de la valeur *of a boiler*, que les Défendeurs, comme *common carriers*, se sont chargés de transporter de Liverpool à Montréal, en vertu d'un connaissement ou *bill of*

lading, contenant l'exception suivante, " not answerable for leakage, breakage or rust." L'objet en question, *the boiler*, est arrivé cassé à Montréal, sans qu'il paraisse comment. Les Défendeurs ont plaidés qu'ils devaient être absous de la demande, en vertu de l'exception susdite, contenue dans le *bill of lading*, et se reposant entièrement sur ce, ils se sont abstenus de faire aucune preuve pour montrer qu'on ne pouvait leur imputer aucune négligence, dans le transport de la chose. Les Demandeurs ayant fait faire l'examen de l'état du *boiler* en la manière ordinaire, il a été constaté qu'il était impropre à l'usage auquel il était destiné, et la vente en ayant été faite en la manière ordinaire, les Demandeurs poursuivent pour la balance. La preuve du Demandeur est complète, quant à la valeur de la chose, et l'état et condition dans lequel elle a été livrée par les Défendeurs. Ces derniers ne sont pas exempts de responsabilité dans le cas actuel, nonobstant l'exception contenue au *bill of lading.* Le commissionnaire ne peut stipuler qu'il ne répondra de sa faute, ou de ce que la loi suppose être sa faute. Il n'y aurait que le cas de force majeure qui pourrait faire absoudre les Défendeurs. Ils auraient dû prouver, ou au moins essayer de prouver, que la boîte contenant l'objet avait été transportée et déchargée avec tout le soin convenable. Si le dommage eut été occasionné par l'eau ou par un feu, il serait facile de supposer que ça n'a pas été par négligence des Défendeurs, mais il en est autrement dans la cas actuel. Pardessus, vol. 2, p. 542 ; Angell common carrier assimilated to an insurer ; § 154. To prevent litigation, the law presumes against a carrier, in every case, except such act as could not happen by the intervention of human means ; § 156. The law presumes against the carrier, unless he shows *the injury could not happen by the intervention of man* ; § 239. Common carriers cannot limit their liability, or evade the consequence of a breach of their legal duties as such, by an *express agreement.* And where common carriers, on receiving goods for transportation, gave the owner a memorandum, by which they promised to forward the goods to their place of destination, " danger of *fire*, &c., excepted," they were liable for a loss by fire, though not resulting from negligence ; § 267. It cannot be supposed that the person sending goods, and the carrier who is to convey them, intended to enter into a contract for the letting and hiring, of labor and care, and agreed, at the same time, to dispense with the exercise of such labor and care. Cette autorité

corrobore celle de Pardessus. (1) Judgment for Plaintiffs, for the full amount claimed (4 *J.*, p. 40.)

CROSS and BANCROFT, for Plaintiffs.

ROSE and RITCHIE, for Defendants.

PROCEDURE.—CHANGEMENT D'ACTION.

COURT OF QUEEN'S BENCH, IN APPEAL,
Montreal, 7th June, 1856.

Coram Sir L. H. LAFONTAINE, Bart. C.-J.,
AYLWIN, J., DUVAL, J.,

RICHARD (Defendant in the Circuit Court), Appellant, and
DENISON (Plaintiff in the Circuit Court), Respondent.

Held: That the litigant parties to a suit cannot, after return of cause into court, by consent, change the nature of the action, so as to render the action one of an entirely different character from that originally instituted.

This was an action originally brought in the Circuit Court, at Richmond, by Denison against Richard, based upon a contract *sous seing privé* in the following terms: " Know all men, " by these present, that I, Peter Richard, do hereby, remise, " release and quit claim, unto Simeon M. Denison, all my " right and title, whatsoever, of a mill and mill privilege, and " all other immoveable property, whatsoever, lying, being and " situated on lot No. 23, in the 8th range of lots in the town- " ship of Shipton, and that I, Peter Richard, in and for the " consideration of the sum of seven pounds and ten shillings, " Halifax currency, already received, in rent, for property " rented, of said Denison, do hereby remise, release and quit " claim all right and title whatsoever, to all that property " above described, unto the said Denison, his heirs and suc- " cessors, henceforth, for ever. In witness whereof, I hereunto " make my mark, in the presence ef the undersigned witnesses. " Thus done, at Shipton, this 22nd day of June, 1852." (Signed,) PIERRE (his mark.) RICHARD. SIMON M. DENISON. WILLIAM R. PHILBRICK, DAVID GRAMMO, Witnesses. The *demande* was for possession of the mill and mill privilege, and, in default of giving possession, to pay fifteen pounds damages. Defendant Richard, before pleading, evoked the cause to the Superior Court, at Sherbrooke, as involving questions of title to lands. After the evocation, Denison was

(1) Plaintiff's Attorney cited, in addition, Flanders, on *Shipping*, sec. 457 to 462; Story, on *Bailments*, sec. 549; *Hart* vs. *Jones*, 1 *R. J. R. Q*, p. 422; *Samuel* vs. *Edmundstone*, 5 *R. J. R. Q.*, p. 449; *Huston* vs. *The Grand Trunk Railway Co.*, *supra*, p. 1 and 10.

advised that, inasmuch as he was proprietor of the mill and mill privilege, by virtue of unquestionable titles, and, as it was of far greater value than the damages claimed by his action, as brought, his rights might be seriously prejudiced by persisting in the action, unless it were in reality a petitory action, founded upon his titles. Consequently, the following consent was made by the litigant parties: " We hereby consent that the declaration, *de novo*, to be filed in this cause " be grounded upon Plaintiff's (Denison's) titles, as absolute " proprietor of the land, the possession of which is sought to " be recovered, in this cause, without reference to the declaration fyled in the Circuit Court, and that the action be, in fact, " treated by the Superior Court as an action *pétitoire*. Sherbrooke, 6th July, 1853. (Signed.) WILLIAM VONDENVELDEN, Defendant's Attorney. J. S. SANBORN, Counsel for Denison." Pursuant to this consent, a new declaration *au pétitoire* was fyled by Denison, and issue joined upon it, and proof had. Denison established his title to the immoveable in question, and the following judgment was rendered, at Sherbrooke, in the Superior Court, on the twenty-seventh day of January, 1854, by Judges Day, Short and Caron: " The court considering that Simeon Minor Denison has fully proved the " material allegations in his declaration set forth, and that " he is the lawful owner and proprietor of a certain mill privilege, consisting of five acres of land, with a mill, dwelling " house and stable thereon erected, situated upon and forming " part of lot n° twenty-three, in the eighth range of lots, in " the township of Shipton, bounded, on the North, South and " West respectively, by lands owned and occupied by said " Denison, in the township of Shipton, and on the East by " lands of Sir James Stuart, and that Pierre N. J. Richard is " in the possession of the same, and unjustly withholds the " same from Denison, doth, in consequence, adjudge and condemn Richard to desist from, quit and abandon the possession and occupation of the said mill, mill privilege, house, " stable, land and premises aforesaid, and every part thereof, " and to restore and deliver the same in Denison, and to pay " to Denison, the sum of seven pounds, ten shillings, as and " for the rents, issues and profits thereon, with interest " thereon." From this judgment, an appeal was instituted by Richard to the Queen's Bench. The question as to the power of the parties, by consent, to change the nature of the original action was not raised in the argument before either court; but the court, in appeal, upon examining the record, arrived at the conviction that the litigant parties had not such power, and *motived* their judgment rendered the day first mentioned, in the following terms: " The court, seeing that the action

" brought by Respondent, in the Circuit Court, at Richmond, " was one suing in damages, for alleged breaches of contract, " entered into by Appellant, with him *sous seing privé*, and " was not either possessory or petitory in its character, and " that, upon the removal of the record to the Superior Court, " at Sherbrooke, pursuant to the evocation set up by Appellant " and, after the allowance of said evocation, by the Superior " Court, by the consent of the two parties litigant, Respondent " wholly changed the nature of his demand, and filed a petitory " action, founded upon an alleged title, under a notarial deed of " sale, to the certain lot in the township of Shipton, in dispute, " and seeking to obtain restitution of part thereof; seeing " that it was not competent to the parties, by their own act, " to make such substitution of one action for another, and " that, therefore, in the judgment rendered, in the said " Superior Court, in favor of Respondent *au pétitoire*, there " is error: It is considered, that said judgment, rendered by the " Superior Court, at Sherbrooke, on the twenty-seventh day " of January, 1854, be and the same is hereby reversed, and " this court, proceeding to render the judgment, which the " Superior Court ought to have rendered, doth hereby set " aside and annul and vacate all the proceedings, orders and " judgments in this cause taken, made and rendered, since, " from and after the sixth day of July, one thousand eight " hundred and fifty-three, the date of the consent paper " entered into between the parties, and it is hereby adjudged " that the record be remitted to the court below, for such " further proceedings, as to law and justice appertain in the " premises; and lastly seeing that both parties were equally " in fault, in coming to such consent, it is ordered that each " party do bear his own costs in his behalf incurred and laid " out." (4 *J.*, p. 42.)

WILLIAM VONDENVELDEN, Attorney for Appellant.
WILLIAM BROOKE, Attorney for Respondent.
J. S. SANBORN, Counsel for Respondent.

TESTAMENT.—FAUX.—PREUVE.

COUR SUPÉRIEURE, Montréal, 30 novembre 1859.

Coram BADGLEY, Justice.

LAVALLÉE et al. *vs.* DEMONTIGNY.

Jugé : **Que, sur une inscription de faux contre un testament solennel, les témoins instrumentaires peuvent être entendus comme témoins,**

mais que leur témoignage isolé et appuyé d'aucune autre preuve ou présomption, ne suffit pas pour maintenir l'inscription de faux. (1)

Les Demandeurs réclamaient du Défendeur la part de leur mère décédée, dans la communauté qui avait existé entre elle et le Défendeur, son époux survivant. Le Défendeur opposait un testament de la mère des Demandeurs qui lui léguait la jouissance de ces biens. Ce testament était fait devant un notaire et deux témoins. Les Demandeurs s'inscrivirent en faux contre le testament, prétendant, entre autres moyens de faux, qu'il n'avait pas été dicté et nommé en présence du notaire et des témoins. A l'enquête, les Demandeurs produisirent les témoins instrumentaires, qui tous deux savaient écrire et avaient signé le testament dans lequel il était déclaré formellement qu'il avait été dicté et nommé en présence du notaire et des témoins. Objection fut faite à l'audition des témoins comme étant incompétents. Cette objection fut réservée par le juge présidant aux enquêtes, et les témoins étant examinés, déclarèrent tous deux que le testament n'avait pas été dicté et nommé en leur présence, et qu'il avait même été rédigé hors de leur connaissance ; que, néanmoins, lorsque le testament fut lu à la testatrice, elle déclara qu'elle était satisfaite, pourvu que *ses biens retournassent aux enfants qu'elle avait eus avec le Défendeur*, disposition qui était contenue dans le testament. Avec cette preuve, la cause fut soumise pour jugement. Lors de l'argument, le Défendeur n'insista pas sur l'incompétence absolue des témoins instrumentaires, mais prétendit que leur témoignage isolé, appuyé d'aucune autre preuve, ne suffisait pas pour maintenir l'inscription de faux, et annuler le testament, et cita plusieurs autorités à cet effet. (2) Les Demandeurs prétendirent, au contraire, que, du moment que l'on admettait les témoins instrumentaires à déposer, foi devait être accordée à leur témoignage, et que leur preuve était complète ; que les autorités citées ne s'appliquaient qu'au faux principal et non au faux incident.

THE COURT : " Considering that Plaintiffs have not established their *moyens de faux* against the last will and testament of Marthe Godon, executed before Filiatrault, notary and witnesses, dated the 19th day of July, 1854, in the said *moyens de faux* mentioned, doth set aside and dismiss the

(1) V. art. 252 C. P. C.

(2) Nouveau Denisart, vo *Faux principal*, p. 458, n° 10, p. 472 n° 4 ; Guyot, *Rep.*, vo *Témoin*, p. 60 ; Domat, *Lois civiles*, liv. 3, tit. 6, sec. 2, n° 7 ; Style de Dumont, p. 104 ; Danty, p. 104 ; Serpillon, *Code du faux*, p. 430, 434 ; Merlin, *Rep.*, vo *Témoins instrumentaires*, § II, n° 8, pp. 73, 74, 75 ; Merlin, *Questions de droit*, vo *Témoins instrumentaires*, § III, p. 246, 254, 255 ; Toullier, tome 9, n° 311 et suiv. ; Carré et Chauveau, *Procédure civile*, t. 2, p. 428, n° 926 ; Meunier *et* Cardinal, Montréal, C. S., n° 454.

"said *moyens de faux*, and doth also reject the *inscription* "*de faux* of Plaintiffs." (4 *J.*, p. 47.)

LORANGER et FRÈRES, Avocats des Demandeurs en faux.

CHERRIER, DORION et DORION, Avocats du Défendeur en faux.

CAPIAS.

SUPERIOR COURT, Montreal, 23rd February, 1860.

IN CHAMBERS.

Coram MONK, J.

TREMAIN *vs.* SANSUM.

Held: 1° That fraudulent preferences to creditors by a Defendant, after his insolvency, do not amount to "secretion," and, therefore, form no ground for *capias*. 2° That the Defendant's intention to go to Boston, and the fraudulent preference he had shewn to his other creditors, and his treatment of the Plaintiff's agent, when he called upon him to make an assignment, by telling him not to bother him, were circumstances sufficiently strong to shew that his intention was to defraud Plaintiff.

Plaintiff's affidavit, upon which the writ issued, set up five allegations: 1st That Defendant, in contemplation of bankruptcy, had, on the 23rd November, 1859, given a bill of sale, of large quantity of coals, forming part of his estate to A. J. Maxham. 2nd That, at the meetings of his creditors, on the 5th and 6th days of December last, and, afterwards, he refused to exhibit his books. 3rd That, on the 3rd of December last, he endeavored to obtain a judgment of *séparation de biens*, on behalf of his wife. 4th That, on the 28th November last, Henry Chapman, one of his creditors, had issued a *saisie-arrêt* before judgment against the Defendant. And 5th That Plaintiff was lately informed, by Samuel Senior, that Defendant was about leaving for Boston, in the United States, where he had procured a situation. Defendant, by petition, specially denied the truth of these allegations, with the exception of the first, viz., the bill of sale to Maxham, which he held was untrue, as regards Plaintiff's statement of its being tainted by fraud.

POPHAM, for Petitioner: Plaintiff has, in his affidavit set up five grounds. The first is the bill of sale to Maxham. By *enquête*, it is proved that this was not a bill of sale, but, in realty, a transfer of a less for a larger quantity of coals, which Maxham had alleged he had consigned to Defendant; and one of Defendant's creditors, and Defendant's bookkeeper, both of whom were present when this bill of sale or transfer was given, declare it was given with their advice; and they prove that it increased instead of lessen-

ed Defendant's estate. The second allegation is met by evidence, that, at the meetings of Defendant's creditors, those who were present were unanimously satisfied with his statement, with one exception, and that could not obtain a seconder to a motion for an examination of his books. And, further, it is proved that, on the 28th December, Defendant, *in writing*, offered to make an assignment of his books and estate. The third allegation has been held by the court to be no ground for *capias*. The fourth is valueless, as Chapman's grounds for making that affidavit have not been proved ; and any presumption of its value is destroyed by the proven fact, that, although the claim on which it issued is still unpaid, the action was never returned into court, although considerable property had been seized. The fifth, as to the alleged information of Senior, that Defendant was going to Boston ; this point must also fall. Defendant examined Mr. Senior. He declares the statement in the affidavit "*to be a perversion*" of what he did say. He states that he never told Kerr (Plaintiff's agent and who made the affidavit in question) that Defendant *was* going to Boston, but simply that he had *heard* from Defendant's clerk that he was applying for a situation vacant in Boston. The *capias* must stand or fall upon its own foundation. Plaintiff has limited his ground for his belief that Defendant was about to abscond, upon the testimony of Senior alone. Now Senior's testimony conclusively destroys that foundation. In the first place, his evidence contradicts the statement of Kerr in his affidavit ; and in the second, what he does say he said, simply amounts to *hearsay*, which is legally valueless, and which took place *two or three weeks previous* to the issuing of the *capias !* In addition to this, Defendant has brought evidence to show that he applied by letter, about the 16th of December last, for a situation of canadian agent for a Boston house at the recommendation of some of his principal creditors ; but that that situation was filled at the time of his application, and communicated to Defendant, and known to these recommending creditors a *fortnight before* this *capias* issued. This additional testimony, although legally inadmisssible, as the sole ground upon which Plaintiff believed Defendant was about to abscond, must be considered as struck out of the affidavit by the evidence of Senior himself, may, however, be taken *de bene esse.*

CARTER, for Plaintiff : The transfer to Maxham was clearly in fraud of Defendant's wife applying for an action of separation ; Defendant's return of coals to Chapman which he had purchased from him ; his failure to exhibit his books, or a balance-sheet, at the meeting with his creditors, and to account for his losses ; his payment of two notes to a creditor named

Martin, are circumstances which, when taken together and when it is remembered that they all occurred at the time of his bankruptcy, and within a few days of each other go to show that Defendant's intention, in this case was a fraudulent one. A fraudulent preference constituted in law "secretion." If the preferences charged against Defendant are not in fraud af his other creditors, the *onus probandi* rested on him to prove it. It was clear that Defendant did intend going to the United States, to procure his situation. It is proved that Plaintiff was informed of that fact, and there is no proof that he knew otherwise.

STUART, for Petitioner: The statute under which the present *capias* issued permits arrest in two cases: first, where a party has "*secreted*" his estate, with intent to defraud; and, secondly, where he is about to abscond with that intent. There are, therefore, two questions simply to be considered in the disposal of this case. First, whether these preferences, alleged to have been given by Defendant to some of his creditors, are fraudulent; and, if so, whether fraudulent conveyances are to be considered "secreting." And, secondly, whether it has been proved that Defendant was about to abscond, with intent to defraud. As to the first question, he contended that preferences given to creditors could not be held to be fraudulent by the mere affidavit of the arresting creditor, but only by a formal judgment of a Court of Justice. That preferences proved to be fraudulent did not constitute "secretion," and, therefore, could not give right to a *capias*. Nor could it be supposed that the Legislature contemplated fraudulent conveyances under the head of "secretion," as the law otherwise provided a remedy than by *capias*. As to the allegation of Defendant's intention to abscond, the proof in the record of his application for the situation in the United States at the recommendation of the principal creditors, of the refusal of that situation a fortnight before the issuing of the *capias*, and of the "hearsay" testimony upon which Plaintiff's proof of this fact solely rests, renders it unsusceptible of a moment's argument.

MONK, J.: Plaintiff's grounds for alleging that Defendant had secreted his estate, at most amount to fraudulent preferences. In consultation with my brother judges, we are unanimous in opinion, that fraudulent preferences do not constitute "secretion"; and, therefore, a *capias* would not lie upon these grounds. But, upon the point of Defendant's intention to abscond, I am of opinion that the circumstances disclosed, by this case, warrant the belief that Plaintiff had sufficient reason for believing that Defendant was about to abscond. Defendant has himself proved his intention to go to Boston, and

the fraudulent preferences he has shewn to his other creditors, and his treatment of Plaintiff's agent when he called upon him to make an assignment, by telling him not to bother him, were circumstances sufficiently strong to shew that his intention was to defraud Plaintiff. Petition rejected with costs. (4 *J.*, p. 48.)

POPHAM, for Petitioner.
STUART, Counsel for Petitioner.
CARTER, for Plaintiff.

ACTION POSSESSOIRE.—POSSESSION.

SUPERIOR COURT, Sherbrooke, 27th January, 1854.

Coram DAY, J., SHORT, J., CARON, J.

ELWIN *vs.* ROYSTON.

Held: That possession of a parcel of land acquired for a mill site, and once formally delivered, is not lost, and an adverse possession is not acquired, by such parcel of land's not being separated from the farm from which it is taken, and that a *trouble* in the possession dates from the time it is sought to appropriate it to such purpose, as would deprive the purchaser of using it for the purposes for which it was acquired.

This was an action *en réintégrande*, by Plaintiff, to be reinstated in the possession of a parcel of land, three acres, for a mill site, which had been acquired by him of one Reed, some eighteen years prior to the alleged *troubles*, and which had been delivered to Plaintiff, by Reed marking certain trees inclosing it. The parcel of land had never been separated from Reed's farm, and his cattle had pastured upon it, in common with the rest of his pasture, for eighteen years. Plaintiff, having another mill site on the same stream upon which a mill was erected, purchased this mill privilege to prevent a rival mill being built thereon. Plaintiff had never paid a balance of the purchase money for said mill site, and Reed regarding himself in possession of it, conveyed it to Defendant Royston, who commenced to build a dam and erect a mill thereon. Plaintiff, assuming this act to be a *trouble* of his possession, instituted this action to have the possession restored to him.

CARON, J.: This is an action *en réintégrande*, with the ordinary conclusions, for the recovery of three acres of land, including mill privilege. Defendant denies Plaintiff's possession of a year and a day, and set up no right of possession himself. The points for Plaintiff to establish, are: 1st, his possession of a year and a day; 2nd, the possession of Defendant. To establish possession, Plaintiff produces title from one Reed, passed some nineteen years ago, and proves that, when said deed was passed, Reed gave Plaintiff possession, by spotting some trees to denote

the line. The land was bought for a mill privilege, and Plaintiff never fenced it out from Reed's lot. It has since remained without Plaintiff's ever having given up possession. Reed indicates that he so viewed the matter by protesting Elwin, Plaintiff, after the institution of this action for non performance of conditions of sale. The court consider that Plaintiff had all the possession of these three acres, of which the nature of the property was susceptible. As he acquired it for a mill privilege, so long as he was not troubled in possession of its being inclosed in Reed's land, and his cattle being allowed to run upon it, cannot be regarded as an adverse possession by Reed. The evidence of Plaintiff substantiates the fact that Plaintiff has been reputed the owner of said three acres and privilege, and of his having done several act of possession, at different times and recently. The court consider that Defendant took possession of it, to build a dam, the very purpose for which Plaintiff acquired it. Judgment go for Plaintiff, to deliver up the land, and pay nominal damages, twenty shillings (4 *J.*, p. 53.)

J. S. SANBORN, for Plaintiff.
W. BROOKE, for Defendant.
W. G. MACK, Counsel for Defendant.

ATTORNEY AD LITEM.

SUPERIOR COURT, Montreal, 31st October, 1859.

Coram SMITH, J.

O'CONNELL *vs.* CORPORATION OF MONTREAL.

Held: That the attorney in a cause is *dominus litis*, and cannot be interfered with or controlled by any understanding or arrangement entered into with his own client by the opposite party or his attorney without his sanction.

SMITH, J.: Plaintiff had been foreclosed from adducing evidence, and the cause was now inscribed for hearing on the merits by Defendants. A motion, however, was made by Plaintiff to set aside the inscription and foreclosure, and to be allowed to re-open the *enquête*, on the grounds stated in an affidavit of his counsel produced with the motion. The grounds were these: that, before the closing of Plaintiff's *enquête*, he, the learned counsel, had an understanding with the mayor, as representing Defendants, that all proceedings in the cause should be suspended for a time, with a view to an amicable settlement, if possible, of the matters in dispute; that, acting

upon this understanding, Plaintiff's counsel did not attend the *enquête*; that he was, in fact, ignorant of any further proceedings being taken, until he was served with a notice of inscription for hearing on the merits; and that he then discovered that Plaintiff's *enquête* had been declared closed in his absence on the application of Defendant's counsel. The question is only important in so far as it touches the point whether a party to a cause, or his counsel, can make an arrangement with the other party when the latter is also represented by a counsel without sanction of the latter, and in such a manner as to stop, or control the proceedings. Of course, as regards the debt, or other subject matter in dispute, the parties may make what agreement they please. The point now to be considered is only as to the proceedings in the cause. In his honor's opinion, such an arrangement, or agreement, was not binding on counsel. It would be most inconvenient and irregular. The attorney is the *dominus litis;* he cannot be interfered with in the management of a cause by any outside arrangement. Under these circumstances, the court cannot recognize the understanding referred to by Plaintiff and the present application must accordingly be rejected. The Plaintiff's counsel called His Honor's attention to the endorsement on the notice of inscription, in which some error occurred in the name of one of the parties, and contended that the cause had consequently not been regularly inscribed, and that judgment could not now be pronounced. His Honor said in reply that there were some irregularities in a record, of which the court was bound to take cognizance, whether pointed out or not. There were others of a more trifling kind, and this was one of them, which must be made the subject of a special motion, or, otherwise, brought specially under the notice of the court. They were covered by silence. Action dismissed for want of proof. (4 *J.*, p. 56, et 10 *D. T. B. C.*, p. 19.)

B. Devlin, for Plaintiff.

J. Papin, for Defendants.

ASSURANCE.—TRANSPORT.

Superior Court, Montreal, 31st October, 1859.

Before Smith, Justice.

Mathewson *vs.* The Western Assurance Co.

M vend à L un terrain, en considération d'une rente constituée de £60, payable annuellement, au capital de £1000, l'acquéreur s'obligeant, par son acte d'acquisition, d'ériger des bâtisses sur le terrain et d'assurer le tout au montant de £400, comme sûreté collatérale.

Le Demandeur auquel la dette est transportée assure les bâtisses ainsi érigées, au montant de £400, pour couvrir le constitut, et, pendant que la police est en force, les bâtisses sont détruites par le feu, mais reconstruites et rétablies à leur condition et valeur primitive par l'acquéreur L, avant l'institution de l'action.

Jugé : 1° Sur action, par l'assuré, sur la police, pour recouvrement de l'assurance, que l'assuré avait la même garantie pour le paiement du constitut qu'il avait avant l'incendie, et qu'il n'y avait eu aucune perte en raison de laquelle une action pût être maintenue.

2° Que le principe qu'un contrat d'assurance est un contrat d'indemnité, était applicable à l'espèce, et, par conséquent, une défense à l'action, nulle perte ayant été soufferte.

The Plaintiff's declaration set up a sale, before notaries, of the 8th November, 1844, by John Mathewson and wife to Calvin P. Ladd, of a lot of land in Griffintown, city of Montreal, in consideration of a constituted rent of £60, payable annually, on a capital of £1000. The purchaser, by the deed, undertook to erect substantial buildings on the lot, of the value of £400, and to cause the same to be insured to their value, and to transfer the policy to the vendors, as collateral security, and to keep the same insured. This debt was transferred to Plaintiff, and, afterwards, on the 17th March, 1853, an assurance for a year was effected by Plaintiff, in Defendants' office, for £400, on the buildings known as " The Montreal and City Foundry," erected on the lot, the insurance being declared in the policy as " effected to cover a *constitut* held by the assured, " on the property described, as security for the payment of " the land." On the 15th June, 1853, the premises were consumed by fire, and the action was brought on the 21st October, 1853. The Defendant pleaded " that the premises had been " rebuilt by Calvin P. Ladd, and were of the same or greater " value than at the time when the same were burnt, and that " such building was effected and completed before the institu- " tion of the present action ; and that Plaintiff had suffered no " loss, but was completely indemnified by the reedification of " the buildings, at a period antecedent to the present suit."

SMITH, Justice : The only point to be determined was whether Defendants were bound to pay the amount of the insurance, notwithstanding the buildings had been restored to their original condition before the institution of the action. It would be difficult to find a case precisely analogous ; but the fundamental principle, in cases of insurance, was that the contract was one of indemnity ; that there could be no recovery, unless there had been a loss. Was there a loss sustained here ? If not, there could be no recovery. In cases of Marine Insurance, it was held, in England and in the United States, that to entitle the insured to recover, the loss must be complete, must exist at the time of the action, and that, if by a change of circumstances, it turned out that no loss was sustained, the

policy afforded no remedy. He would refer to the case of *Hamilton* vs. *Mendes,* 2 Burr, p. 1198, where a vessel was captured, on the 6th May, 1760, the loss being then complete, but was recaptured, on the 23rd May, and brought into the port of London, on the 19th August. On the 26th June, an abandonment was made, and the question, in the case, as reserved, was whether Plaintiff, on the 26th June, had the right to *abandon* and claim as for a *total* loss. The court held that Plaintiff could only recover an indemnity, according to the nature of his case, *at the time of action brought,* or, at most, at the time of his offer to *abandon ;* without, however, deciding how it would be in case Plaintiff had been restored to safety between the offer to abandon and the action brought. So, in the case of Life Insurance, he would refer to the case of *Godsall* vs. *Bolders et al.,* directors of the Pelican Insurance Co., quoted in Smith's leading cases. In that case, Plaintiff, a coach maker, had insurance on the life of Mr. Pitt for £500. Mr. Pitt died on the 23rd February, 1806, and Plaintiff's claim was paid by Pitt's executors, in March following, out of monies granted by parliament, for the purpose of paying Pitt's debts. The action was served in June, and it was there held that the interest of the insuring creditor depended on Mr. Pitt's life rendering payment of the debt more probable, and, on the probability of loss resulting from his death; and that the supposed damnification or loss resulting from his death had been wholly obviated by the payment, and the foundation of the action therefore failed. Lord Ellenborough, in this case, quoting the language of lord Mansfield, in the case of *Hamilton* vs. *Mendes,* said : " It is a contradiction in terms to " bring an action for *indemnity,* " where, upon the whole event, no damage has been sus- " tained." He would refer also to *Parson's Mer. Law,* p. 509. Where, in reference to an insurance against fire, it is said : " The mortgagee has an interest only equal to his debt, and " founded upon it; and, if the debt be paid, the interest ceases, " and the policy is discharged; and he can recover no more " than the amount of his debt. And, if a house, insured by a " mortgagee, was damaged by fire, even considerably, or per- " haps destroyed, it might be doubted, on what we should " think good grounds, whether he could recover, if it were " proved that the remaining value of the premises mortgaged " was certainly more than sufficient to secure his debt, and all " reasonably possible interest, costs and charges." And, in a case reported in the foot-note, Gibson, J., said : " Notwith- " standing the form of the contract, therefore, a mortgagee in- " sures, whether generally or specially, not the ultimate safety " of the whole of the property, but only so much of it as may " be enough to satisfy his mortgage. It is not the specific pro-

"perty that is insured, but its capacity to pay the mortgage "debt. In effect, the security is insured." In the case now before the court, the premises were restored to their original condition. The building must be liable for the debt of the *bailleur de fonds*, on the principle that *ædificium cedet solo*. Another question might be raised here, whether the company if they paid Plaintiff, would have the right to a subrogation in Plaintiff's rights, and could fall back upon Ladd? Ladd might contend that he was not liable for the £400, but only to pay the £60 per annum, according to the terms of his deed. He merely threw out this, but the judgment would rest on the fact that there being no loss at the time of the institution of the action, there could be no recovery. The principles he would lay down in the case were the following: 1° That the contract of insurance, being a contract of indemnity, it is the actual loss alone which can be the basis of compensation under the contract, and this loss must be determined by the actual state of the case at the time of action brought; 2° the insurance, in the case of a mortgagee insuring the house, or *corpus* on which the mortgage rest, and in the possession of the mortgager, as the owner thereof, at the time of effecting the insurance is a special insurance of the interest of the mortgagee in the thing insured, and limited to the interest specified in the policy itself; 3° the special interest thus insured by the mortgagee is not the safety of the whole property insured, but only so much of it as may be necessary to cover his mortgage debt; 4° that, in the present instance, the *constitut* which was insured, to the extent of £400, on the buildings erected on the land sold, as a security for the payment of the *constitut*, is amply covered and protected by the value of the buildings erected by the debtor of the *constitut* on the land, after the fire had occurred and before action brought; that the security of Plaintiff is not in any way impaired or disminished and, consequently, no loss has in fact been sustained.

JUDGMENT: "Considering that Plaintiff hath failed to esta-"blish any right in law to have and maintain the conclusions "of his action; and, further, considering that Defendants have "fully established that the insurance effected by John Ma-"thewson, the *cédant* of Plaintiff, under the policies of insu-"rance set forth in Plaintiff's action, on the buildings des-"cribed in said policies, was effected to cover a *droit de cons-"titut*, which had been created in favour of John Mathewson "and his wife, by Calvin P. Ladd, and for the security of "which *constitut* Ladd undertaken to build and erect on the "said lot of land; and, further, considering that the insurance "was a special insurance limited to the sum of four hundred

"pounds by John Mathewson and wife in the policies; and, "further, considering that, after the fire and the destruction "of the house, and, before the institution of this action, the "house insured had been rebuilt by Calvin P. Ladd, the debt- "or of the *constitut*, and that, thereby, the house or *corpus* "insured for the security of the said *constitut* had been res- "tored and replaced; and, further, considering the Plaintiff, "as representing John Mathewson and wife, has now the same "security for the payment of said *constitut* which he had be- "fore the fire occurred, and that, thereby, no loss has been "suffered by Plaintiff, by reason of which any action can lie "under the provisions of the policies of insurance; and, fur- "ther, considering that the contract of insurance is a contract "of indemnity, and can only be enforced to cover a loss ac- "tually sustained, the court doth maintain the exception and "doth dismiss this action." (10 *D. T. B. C.*, p. 8, et 4 *J.*, p. 57.)

ROSE and RITCHIE, for Plaintiff.

H. STUART, for Defendant.

JURIDICTION.—QUO-WARRANTO.

SUPERIOR COURT, Montreal, 31st October, 1859.

Before SMITH and BADGLEY, Justices, In vacation.

ADAMS *and* DUHAMEL.

L'acte de 1849, 12 Vict., cap. 41, sec. 1, décrète que "quand il arri- "vera qu'aucune personne usurpera ou s'emparera illégalement "d'aucunes charges publiques ou d'aucunes franchises, dans cette "partie de la Province, ci-devant la province du Bas-Canada, ou d'au- "cunes charges dans aucune corporation ou corps public, ou dans aucun "bureau,...... il sera loisible à la Cour Supérieure siégeant dans le "district dans lequel cette usurpation ou possession illégale aura eu "lieu, ou à deux juges ou plus de telle cour, en vacance, sur une décla- "ration ou requête libellée,......accompagnée d'affidavits...... alléguant "...... d'ordonner l'émanation d'un writ, commandant que la personne "dont on se plaint ainsi soit assignée à comparaître devant la dite "cour ou les dits juges pour répondre à la dite déclaration ou requête."

L'acte de 1851, 14 et 15 Vic., cap. 128, sec. 27, décrète : "Que pour "faciliter la décision des cas dans lesquels le droit de toute personne à "remplir et exercer aucune charge, dans la corporation de la dite cité, "pourra être mis en question, la Cour Supérieure du district de "Montréal, siégeant en terme, ou à ses séances hebdomadaires, pour "prendre connaissance des procès et actions en matière civile, sur la "requête libellée d'un citoyen de la dite cité, habile à voter à l'élection "de conseiller pour quelqu'un des quartiers d'icelle, appuyé sur affi- "davit...... se plaignant...... aura plein pouvoir et autorité d'ordonner à "la personne contre laquelle plainte sera ainsi portée de comparaître "devant telle cour, et de faire voir en vertu de quelle autorité elle "exerce ou prétend exercer la dite charge."

Une requête fut présentée à deux des juges de la Cour Supérieure

pour le Bas-Canada, siégeant dans et pour le district de Montréal, en vacance, en vertu de l'acte premièrement cité, sur laquelle requête l'émanation d'un writ contre le Défendeur en sa qualité de conseiller pour la cité de Montréal fut ordonnée.

Jugé : Sur exception à la forme, que les juges auxquels l'exception fut soumise au mérite, n'avaient aucune juridiction sur les matières qui faisaient le sujet de la requête.

This was a petition presented in vacation to two of the justices of the Superior Court, at Montreal, in chambers, supported by affidavit, and an order was made by SMITH and MONDELET, Justices, for a writ of summons to issue. The petition prayed "that the Respondent be declared guilty of "usurping and unlawfully holding the office of councillor of "St. Mary's ward, in the city of Montreal, and that he be "ousted and excluded from the office, and that Austin Adams "be declared to have been and to be rightfully entitled to the "office; and that the corporation and council of the city "be ordered to admit the Petitioner to said office, &c." The grounds alleged in support of the petition were to the effect that Petitioner had the largest number of legal votes, and that Respondent was not a *resident house-holder* qualified as required by the act. The Respondent filed an *exception à la forme* on several grounds, namely: 1° that "the petition "should, by law, be in the form of an information to the "Superior Court; 2° that the petition was wrongly "addressed to any two or more justices of Her Majesty, "Superior Court sitting in and for the district of Montreal; "3° that the petition was not presented to the Superior "Court, at any time, during the sitting of the court."

CARTER, for Respondent, urged that the petition was brought under the prerogative act 12 Vict., cap. 41, sec. 1, instead of under the statute 14 and 15 Vict., cap. 128, sect. 27; that, under the latter statute, which consolidates the provisions of the ordinances incorporating the city of Montreal, such petition, in respect of the election of persons holding offices in the city corporation, can alone be brought before the Superior Court, in term, the weekly sessions referred to in that act having been abolished. (1)

ROBERTSON, contended that the latter statute did not repeal the prerogative act, but gave an additional mode of remedy to facilitate the decision of cases relative to the city corporation. (2) That when such additional remedy was given, the recourse might be had under either act. That, moreover,

(1) 12th Vict., cap. 41, sec. 1; 14th and 15th Vict., cap. 128, sec. 27.

(2) Dwarris, *on Statutes*, p. 532. "It is a general rule that subsequent "statutes which add accumulative penalties and institute new methods of "proceeding, do not repeal former penalties and methods of proceeding or"dained by preceding statutes, without negative words."

there could be no repeal of a statute by implication, there being no repugnancy and no repealing words.

The hearing, on the exception, was had before SMITH and MONDELET, Justices, on the 13th April, 1859, but it was intimated to Counsel that some difference of opinion existed between the judges as to what judgment should be rendered, and the case was submitted to SMITH and BADGLEY, Justices, and the following judgment was rendered : " The judges " before whom the present *requête libellée* has been submitted " for adjudication, on the merits of the *exception à la forme* " declared that they, as judges in vacation, have no jurisdic- " tion on the subject matter of this petition, and proceedings " had therein, and do therefore maintain the *exception à la* " *forme*." (1) (10 *D. T. B. C.*, p. 14.)

ROBERTSON, A. and W., for Petitioner.

CARTER, E., for Defendant.

IMMEUBLES.—FUMIERS.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 1st December, 1859.

Before Sir L. H. LAFONTAINE, Bart., Chief Justice, AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

WYMAN, Appellant, and EDSON, Respondent.

Jugé : 1° Que les fumiers sur une terre, lors de la vente de telle terre, deviennent la propriété de l'acquéreur.

2° Que les fumiers faits subséquemment deviennent aussi la propriété de l'acquéreur, le vendeur ne se justifiant soit par titre ou autrement, mais plaidant seulement par dénégation à une action pour le recouvrement de dommages résultant de l'enlèvement des fumiers sans la permission de l'acquéreur. (2)

This was an appeal from a judgment rendered in the Circuit Court, Stanstead, district of St. Francis. The action was brought to recover £50 damages alleged to have been suffered by Appellant, by reason of Respondent having removed a quantity of manure from the farm sold by him to Appellant, by deed of the 26th October, 1856. Part of the manure so removed was on the premises at the time of the sale,

(1) In the cause n° 2634, *Lynch* vs. *Papin*, an order was given in vacation, 10th January, 1854 (DAY and SMITH, Justices), for a summons returnable on the 23rd January, and by judgment of the 31st October, 1854, SMITH, VANFELSON and MONDELET, Justices, the Defendant was ousted on the same ground as that set up in the present case, viz., that he was not a resident householder. (4 *R. J. R. Q.*, p. 89.)

(2) V. art. 379 C. C.

and part was new manure made subsequently, the vendor having remained in possession with the consent of Appellant. The plea amounted to a general denial. By the judgment appealed from, rendered by SHORT, Justice, the 4th May, 1859, the action, so far as it related to the manure, was dismissed. The grounds urged by the Appellant were: 1° that the manure passed with the land; 2° that the new manure belonged to the farm *par destination.* (1)

JUDGMENT: 1. " Seeing that, by law, the right of property " in the manure lying upon the lot of land in question, sold " by Respondent to Appellant, passed to Appellant by the sale; " 2. seeing that Respondent set up no adverse title in himself, " either to the manure so lying upon the land, or to that " made subsequently thereto upon the said land, during the " occupation thereof by Respondent, and no justification for " the removal of the same, and instead of setting up an exception, he pleaded a general denegation; 3. seeing that the " weight of evidence is in favor of Appellant, and that a liability on the part of Respondent to leave said manure upon " the land, is established, as an equivalent for the gratuitous " enjoyment of the same, had by Respondent subsequently to " the sale; 4. seeing that the value of said manure may, from " the testimony adduced, be estimated at the sum of ten pounds " and that, therefore, in dismissing so much of the demand of " Appellant as relates to said manure, there is error, &c." Judgment for £10 7 6. (10 *D. T. B. C.*, p. 17.)

SANBORN and BROOKS, for Appellant.

JOHNSON, Q. C., for Respondent.

QUEEN'S BENCH, IN APPEAL, Montreal, 7th December, 1859.

OSGOOD, Appellant, *and* KELLAM, Respondent.

Le Demandeur porta une action pétitoire contre le Défendeur, pour recouvrer la possession d'un lot de terre acquis par lui, par acte du 21 janvier 1856; il n'était allégué aucun autre titre dans sa déclaration.

Le Défendeur plaida, sans alléguer aucun titre, qu'antérieurement à la date du titre du Demandeur, il avait été en possession du lot, comme propriétaire, pendant plus de dix ans.

Il fut permis au Demandeur de produire une réponse spéciale, dans laquelle il alléguait des titres antérieurs; le Défendeur objecta et se plaignit du jugement interlocutoire permettant la production de cette réponse spéciale, comme étant de fait une nouvelle action, à laquelle son plaidoyer ne pouvait s'appliquer, et aussi du jugement interlocutoire mettant de côté la clôture de l'enquête du Demandeur.

(1) Merlin, *Répertoire*, vo *Fumiers;* Guyot, *Répertoire*, vo *Fumiers;* Troplong, *Louage*, nos 666, 780, 782, 1232; Pothier, *Louage*, 190.

Jugé: Que l'action du Demandeur devait être renvoyée, les parties mises hors de cour dos à dos, chacune d'elles payant ses propres frais, dans les deux tribunaux, pour les raisons suivantes.

1° Parce que le Demandeur avait failli d'établir par témoignages, son titre de propriété tel qu'allégué par lui dans sa déclaration, et parce que ses droits résultaient d'une possession et de titres antérieurs à ceux allégués par lui.

2° Parce que la défense, ou exception, plaidée par le Défendeur était irrégulière et insuffisante en droit, comme n'alléguant pas suffisamment un titre à l'encontre de celui du Demandeur.

3° Parce que l'issue jointe entre les parties était irrégulière, et l'on aurait pas dû leur permettre de procéder à l'enquête, et parce que la preuve produite ne cadrait pas avec les plaidoyers.

The action of Respondent, brought by him in the Circuit Court of the district of Saint-Francis, was to recover possession of a lot of land, in the township of Compton. The action was based upon a deed of sale from Luke Wadleigh to Respondent, of the 21st January, 1856. The declaration set forth this deed and that, at the time of its execution, Wadleigh was the proprietor and in possession of the land; it further set forth the illegal occupation of Defendant. The Defendant after denying the proprietorship and possession of Plaintiff and the validity of his title alleged that, at and prior to the date of Plaintiff's deed, he was himself in possession, as proprietor, of the lot in question, and had been so for more than ten years. In this answer, Plaintiff alleged that the possession of Defendant was the illegal occupancy of a trespasser without right; that Plaintiff had been, by himself and his *auteurs*, in possession of the land in question, for more than fifty years prior to the illegal possession of Defendant, under good and sufficient titles set up in the answer, a deed from Page Bull, one of the associates of the township of Compton, to Kilborn, Coffin and Pennoyer, the leaders of the township, passed before Lalanne, notary; Kilborn, Coffin and Pennoyer, by a deed of conveyance and transaction passed before Lalanne, notary public, acting as attorneys of Vondenvelden, selling the land to one Jones. In this deed, it was declared that, in the *partage*, the lots referred to in the patent had been drawn by Vondenvelden and belonged to him. Reference was also made to a deed passed before Ritchie and colleague, notaries, on the 17th day of March, 1854, from William Vondenvelden, to Luke Wadleigh, who sold to Plaintiff, by the deed set up in the declaration. The Plaintiff, finding that the deed from the original patentee was not completed by the signature of the notary, made application to the judge taking an *enquête* in the cause at Montreal, for an order to the prothonotary to give up the deed, so that Plaintiff might prove it as an act *sous seing privé*. This application was rejected; Plaintiff's other evidence was confined to the proof of the present Von-

denvelden being the heir of William Vondenvelden, Defendant having formally admitted that he was in possession of the land claimed by Plaintiff. The evidence adduced by Defendant consisted of admissions given him by Plaintiff of a deed of quit claim from one Lett, produced by Defendant, but not pleaded by him, and of the possession of Defendant, for two years prior to Plaintiff's deed. The judgment appealed from was rendered on the 30th day of June last, by SHORT, Justice, dismissing the exception pleaded by Defendant, and declaring Plaintiff to be the lawful owner of the land in question. The grounds urged in support of the appeal were : 1st, The irregularity of the interlocutory judgment setting aside Defendant's inscription for *enquete*, and all proceedings subsequent thereto, and of the interlocutory judgment permitting Plaintiff to file a special answer ; 2nd, because the titles set up in the answer constituted, in fact, a new action, setting up anterior titles of which Defendant had no communication, and to which his pleas could be no answer ; (1) 3rd that Respondent had failed to prove the titles set up in his special answer, or that William Vondenvelden, whom he pretended to be the *auteur* of Wadleigh, was ever seized or possessed of the land in question, or to prove that Page Bull, the patentee of the land, ever conveyed the same to any person, or that the same was ever conveyed to William Vondenvelden, senior, or that the present William Vondenvelden, from whom he pretended Wadleigh to have derived, was the heir of the late William Vondenvelden, there being no proof of the marriage of the late William Vondenvelden ; 4th, because Appellant proved by the admissions of record in the cause, as well as by the evidence rejected, that he was, and his *auteurs* had been, in possession, as proprietors, under *titre translatif de propriété*, long antecedent to the deed from William Vondenvelden to Luke Wadleigh, and that neither of these parties were ever in possession of the land, and the deeds set up anterior to the deed from William Vondenvelden to Luke Wadleigh were not of a form or nature to convey property, without tradition, and they were not perfected by tradition. The grounds, urged by Respondent were : 1° that the deed set up in the declaration was of itself sufficient to serve as the basis of a petitory action, and would require no proof of the proprietorship of the vendor of Plaintiff, as against a trespasser shewing no right in himself, and that the deed transferred all Wadleigh's rights without livery of seizin, tradition, or other

(1) *Romain* vs. *Dugal*, and *Jobin*, Oppt., 6 *R. J. R. Q.*, p. 208 ; *Morison* vs. *Kierskowski*, 4 *R. J. R. Q.*, p. 218 ; *Marsolais* vs. *Lesage*, 5 *R. J. R. Q.*, p. 398 ; *Pacquet* vs. *Gaspard*, 1 *R. J. R. Q.*, p 164 ; Merlin, *Répertoire*, vbo *Revendication*, p. 44.

formality; (1) 2° that Plaintiff might have answered the plea of Defendant by a general answer, and, if Defendant had succeeded in establishing a possession anterior to Plaintiff's title, Plaintiff could then have fortified the title upon which his action was founded by the titles of his *auteurs* (2) and have justified the proprietorship of Luke Wadleigh, his vendor; (3) that his position could not be injured by setting up by a pleading the possession of his *auteurs*, based upon their titles, as a complete answer to the exception of Defendant; 3° that Defendant knew that, by being made Defendant in a petitory action, he was challenged to a comparison of titles with Plaintiff; (4) the possession which Defendant had being a possession which was not founded upon title could be of little avail, unless Plaintiff failed to produce in evidence titles anterior to the adverse possession of Defendant; 4° that a purchaser who derives his title in good faith from a person who was not the proprietor, but whom he had good reason to believe such, may rely upon his title as alone sufficient to maintain his action against a possessor who produces no title. (5)

JUDGMENT: " Seeing that Respondent failed to establish in " evidence the title to the real property in question, and that " his rights depend upon a possession and chain of titles anterior " to that asserted by him. Seeing that the plea or the exception pleaded by Appellant was irregular and insufficient in " law as failing to allege with sufficient certainty an adverse " title on his part. Seeing that the issue between the parties " was irregular, and that they ought not to have been per- " mitted to proceed to evidence, and that the evidence as " taken, is not warranted by the pleadings. Seeing, therefore, " that, in the award of judgment by the court below, in favor " of Respondent there is error, &c., the action of Respondent " is dismissed." (10 *D. T. B. C.*, p. 22.)

SANBORN and BROOKS, for Appellant.

RITCHIE, for Respondent.

(1) 4 Vic., cap. 30, sec. 38.

(2) Merlin, *Rép.*, vbo *Revendication*, § 2, sec. 3.

(3) Pothier, *Propriété*, n° 324; 21 Duranton, n° 289; *Stuart* vs. *Ives*, 2 *R. J. R. Q.*, p. 452; *Guyot*, vbo *Revendication*, p. 622.

(4) 2 Bourjon, title IV, sec. 3, p. 516

(5) Pothier, *Propriété*, no 325.

VENTE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 1st December, 1859.

Before Sir L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, DUVAL, and MEREDITH, Justices and BERTHELOT, J. *ad hoc.*

HEMPSTED, Appellant, *and* DRUMMOND et al., Respondent.

C reçut de D, un des Défendeurs, un billet fait par lui pour £250. endossé par l'autre Défendeur, sur quoi il déclara que, par convention de ce jour, il avait vendu à D 1000 actions dans une certaine entreprise, pour l'exploitation d'ardoise, et que, sur paiement du billet, il exécuterait le transport voulu des actions dans les livres de la compagnie ; C retenant les actions comme sûreté collatérale pour le paiement du billet, il fut stipulé que si le billet n'était pas payé à son échéance, il serait loisible à C de vendre les actions et d'appliquer les argents en provenant au paiement du billet.

Pour satisfaire au billet de £250, deux autres billets des mêmes personnes furent données à C, et la balance du premier billet payée.

Une action fut portée sur ces deux billets au nom de H, le commis de C, lequel, il fut admis, représentait C. La déclaration alléguait la confection des deux billets, et leur endossement à C, lequel était allégué en être devenu par ces endossements le porteur et le propriétaire, qui les avait remis et délivrés à H, le Demandeur, pour valeur reçue, au moyen de quoi, était-il encore allegué, ce dernier était devenu et était encore le porteur et le seul et vrai propriétaire des dits billets, et créancier des Défendeurs ; mais il n'était pas allégué que les billets avaient été endossés au Demandeur par C, le nom duquel apparaissait sur les billets comme effacé.

Les Défendeurs plaidèrent la convention et soutinrent que le Demandeur était tenu de faire offre de céder les actions, ce qu'il avait refusé de faire.

Jugé : 1° Que le Demandeur, ayant fait défaut de faire offre par sa déclaration et ayant refusé de faire cession des actions, son action devait être renvoyée.

2° Que le Demandeur n'avait pas prouvé en vertu de quel titre il tenait les billets, et que l'allégué, qu'ils lui avaient été remis par C, n'était pas suffisant pour le constituer créancier, les billets n'étant pas payables au porteur, et aucun endossement par C au Demandeur n'étant allégué.

Sir L. H. LAFONTAINE, Bart. Juge-en-Chef : L'objet de l'action est le recouvrement du montant de deux billets à ordre, l'un du 5 août 1856, pour £100, payable à 3 mois, fait par Drummond, à l'ordre de Dunlop, et l'autre du 5 octobre 1856, pour £50 14 10, payable sous un mois, fait par Dunlop, à l'ordre de Drummond. La déclaration allègue que ces deux billets ont été endossés respectivement par Dunlop et Drummond à John Crawford, qui, par ces endossements, en est devenu le créancier ; puis elle ajoute, mais sans parler d'endossement de Crawford, que celui-ci, depuis l'échéance, a remis et délivré, pour valeur reçue, les dits billets au Demandeur, qui en devint ainsi et en est encore aujourd'hui le seul vrai et légitime porteur, propriétaire et créancier. Les billets furent protestés, l'un

le 8, et l'autre le 10 novembre 1856. Le Demandeur est le commis de John Crawford. L'écrit suivant sert de base à la défense : " Montreal, 28th December, 1855. C. J. Dunlop, Esq. Sir, I have, " this day, sold to you one thousand shares stock in the King- " slate works (paid up stock), at five shillings per share, paya- " ble by your note, endorsed by Lewis T. Drummond, at four " months date, with interest, which note I have this day recei- " ved, and, on payment of the note, I bind myself to execute " the necessary transfer of the shares in the books of the com- " pany. It being agreed and understood that I am to hold the " stock in my name, until the note is matured, as collateral " security for the payment of the note. Provided the note be " not paid at maturity, I shall be at liberty to seil, forthwith " the stock, at the best price obtainable, and appropriate the " proceeds thereof to the liquidation of the note , or so much " thereof as the proceeds of the sale will amount to. (Signed) " JOHN CRAWFORD, C. J. DUNLOP." Les Défendeurs prétendent que le billet de £250, fut payé à son échéance, mais qu'une partie de ce paiement consiste dans les deux billets qui font lè sujet de la présente action, ce qui est reconnu être le cas par le Demandeur. Aux termes de la vente des mille actions, les Défendeurs prétendent que le Demandeur aurait dû offrir un transport de ces actions par Crawford, transport que celui-ci a toujours refusé d'effectuer. C'est le principal motif du jugement qui a donné gain de causes aux Défendeurs. Il me semble que ce motif est bien fondé, et que par conséquent le jugement doit être confirmé. Qu'on remarque que le Demandeur reconnaît être à la place de Crawford, et être tenu de remplir ses engagements envers les Défendeurs. L'admission a été faite par les parties.

Il y a encore, ce me semble, une autre objection fatale à l'action du Demandeur. C'est que le Demandeur ne prouve pas de titre en vertu duquel il est porteur des deux billets. Il se contente d'alléguer, dans sa déclaration, que Crawford lui a " remis et délivré" ces billets. Cela n'est pas suffisant pour le constituer légalement le créancier. Les billets ne sont pas payables au porteur, et il n'est pas allégué qu'ils aient été endossés en blanc. D'après les allégués de la déclaration, ce serait Crawford à qui il est dit qu'ils ont été endossés, qui en serait encore le porteur. Il n'y a aucune assertion que Crawford les ait endossés à son tour. On voit bien, au dos des billets, que son nom y avait été écrit, mais il a été effacé.

MEREDITH, Justice, *dissentiente :* The letter of the 28th December, 1855, setting forth the original agreement between Crawford, now represented by Plaintiff and Defendants (now Respondents) contains these words : " and on payment " of the note, I bind myself to excecute the necessary transfer

" of the shares in the books of the company. It being agreed " and understood that I am to hold the stock in my name, " until the note is matured, as collateral security for the pay- " ment of the note." Under the agreement, I think the holder of the note had a right to exact payment of it, without tendering a transfer of the shares. The words " and *on payment " of the note*, I bind myself to execute the necessary transfer " of the shares," show that the note was to be paid before the making of the transfer of the shares; and this view is strengthened by the declaration in the letter that the stock was to be held " as collateral security for the payment of the note," inasmuch as a creditor holding collateral security is not bound to offer to give it up when he sues for the debt, on account of which such collateral security was received. The fact that the note originally given was negotiable, is also of importance in this point of view. Crawford had certainly a right to transfer to any third party the note which he originally received, but he had not a right before that note reached maturity to part with the stock held as collateral security. From the nature of the transaction, therefore, the note and the stock were likely to be held by different persons, so that Respondents could not, at any time, have counted upon receiving the stock at the same time that they paid the note. Having thus explained my views as to the original transactions between Crawford and Respondents, I may observe that I do not think the giving of paper in renewal can, to the extent of the paper so given, be deemed an actual payment of the original debt, so as to entitle Respondents to a transfer of the stock held by Crawford as collateral security. On the contrary, I think Crawford has still a right to hold the stock as collateral security until the renewal note be paid.

But even, if the giving of the renewal notes did cause novation as contended by Respondents, still, as regards the matter in controversy, such a novation could not be of any advantage to Respondents, because the novation could not, by any possibility, have the effect of subjecting the paper given in renewal to a condition precedent to which the original note was not subject. Granting for the sake of argument, that a novation did take place; and granting also, for the sake of argument, that Respondents from the date of that novation were entitled to demand their stock; still, even according to this view, it is plain that the obligation, on the part of Crawford, to transfer the stock, and the obligation on the part of Appellant to pay the renewal paper, would be separate and independent obligations; and, although, in the case now supposed, Respondent might have claimed damages for the delivery of the stock, yet they could not, without any allega-

tion of damages, allege the refusal by Appellant to transfer the stock as a base to the present action. In other words: if, as Respondents allege, the renewal of the paper caused a novation, such novation, at the same time, that it gave the Respondents a right to their stock, irrespective of the conditions of the first agreement, must also have given Appellants the renewal note equally free from the conditions of the first agreement. In that case, as already observed, the obligation of Appellants to transfer the stock, and the obligation of Respondents to pay the renewal notes, would have been separate and independent obligations, and neither party could have demanded the fulfilment of the obligation in his own favor, as a condition precedent to the performance by him of his own obligation. I have thought it right to consider this case as it has been submitted by Respondents, but the view I take of it myself is simply that, according to the original agreement between the parties, Respondents were bound to pay their notes, before they could claim a transfer of the stock held by Appellant as collateral security, and that the right of the parties in this respect have not been changed by the renewal in part of the promissory note first given, because the renewal cannot be deemed equivalent to an actual payment. I therefore cannot avoid the conclusion that the judgment of the court below ought to have been in favor of Plaintiff.

AYLWIN, Justice, thought the judgment of the court below should be maintained, on the ground that Crawford never had the stock, and could not, therefore, transfer and deliver it, and that Appellant had no other rights than Crawford had, being in his place.

JUDGMENT: Considering that, in the judgment appealed from, (1) there is no error, &c., the court doth confirm, etc. (10 *D. T. B. C.*, p. 27.)

LAFLAMME, LAFLAMME and BARNARD, for Appellant.

AUSTIN, for Respondents.

(1) Before DAY, SMITH and MONDELET, S. C., 30th September, 1857.
The Court: "Considering that Defendants have established, by evidence, "the material allegations of the exception by them pleaded, and more especially that the 1000 shares of capital stock in the Kingsey Slate Works, in "the exception mentioned, were never delivered to Defendants, or either of "them; and considering that Defendants, are entitled, on the payment of the "notes to have a transfer executed of the capital stock by John Crawford, "to and in favor of Charles J. Dunlop, one of Defendants; and that Plaintiff "hath failed, in and by his action, and the declaration therein filed, to offer "any such transfer of the capital stock, on payment of the notes, maintaining the exception, doth dismiss the action of Plaintiff."

FAUX PRETEXTES.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 16 décembre 1859.

Before Sir L. H. LAFONTAINE, Baronet, Chief-Justice.
AYLWIN, DUVAL and C. MONDELET, Justices.

REGINA *vs.* SAINT-LOUIS et al.

Où A, un actionnaire dans une compagnie non incorporée et agissant comme son agent, donna un billet promissoire, à un mois, à B, autre actionnaire de la compagnie, pour la somme de $250 pour rencontrer une traite sur la compagnie, sous protêt, pour $200, due pour assurance, et A subséquemment représenta à un comité de direction de la compagnie, qu'il avait donné le billet pour la somme de $250, parce que B, lui avait dit que M, un courtier, avait escompté le billet pour les $50, et que B n'avait pu l'escompter pour une moindre somme; et B lui-même représenta au dit comité qu'il avait été obligé de payer à M $50 pour escompte du billet, et que M l'avait chargé d'en faire le recouvrement, sur lesquelles représentations un chèque avait été donné à A, au moyen duquel il avait obtenu du trésorier de la compagnie les moyens de payer le billet; et il fut, par après, constaté que M n'avait jamais escompté le billet, et que, peu de temps après que le billet fut payé, B admit que c'était lui et non M qui l'avait escompté, et qu'il avait prelevé $50 d'escompte; sur quoi A et B furent convaincus d'avoir obtenu "sous de faux prétextes" la somme de $50, des argents de D et autres (actionnaires de la compagnie) avec intention de les frauder.

Jugé: 1° Que la conviction ne pouvait valoir, et que ceci n'était pas un faux prétexte sous les 4e et 5e Vic., ch. 25, sec. 45, (1) ni sous la 18e Vic., ch. 92, sec. 12. (2)

2° Qu'un actionnaire dans telle compagnie ne peut commettre un larcin dans tel cas, ni être coupable d'obtenir les argents de la compagnie sous de faux prétextes, en autant qu'étant actionnaire il est copropriétaire des fonds et des effets de la compagnie. (3)

The prisoners were tried and convicted before Mr. Justice Dominique Mondelet, holding the criminal term of the Court of Queen's Bench, at Three Rivers, in September, 1859, on an indictment on the 4th and 5th Vic., cap. 24, sec. 42, 4th and 5th Vic., cap. 25, sec. 45, and the 18th Vic., cap. 92, sec. 12, charging them with having, by false pretences, obtained from Sévère Dumoulin and others, the sum of $50, of the monies of the said Dumoulin and others, with intent to defraud. The

(1) By which it is enacted, "That if any person shall, by any false pretence, "obtain from any other person any chattel, money, or valuable security, "with intent to cheat or defraud any person of the same, every such offender "shall be guilty of a misdemeanor, &c., &c."

(2) Which enacts, "It shall be sufficient in any indictment for obtaining or "attempting to obtain any property by false pretences, with intent to de-"fraud, to state that such property was obtained or attempted to be obtained "by the Defendant by false pretences, with intent to defraud, without any "further or more particular statement of such false pretences, &c." V. Art. 358 à 363 *Code crim.*

(3) V. Art. 3, § y, du *Code crim.*

second count charged them with intent to defraud generally. The evidence established that a company or association was formed at Three Rivers, in the summer of 1858, under the name of " La Compagnie de Navigation de Trois-Rivières." composed of the private prosecutors, the Defendants on trial and several other persons, who became subscribers of stock for the purpose of purchasing a steamer to run between Three Rivers and Montreal, for their joint benefit; that a steamer called the " Ottawa " was accordingly purchased, and that Defendant St. Louis, who was employed as captain, effected an insurance on the vessel, at Montreal, the premium of which, $200, was paid by a draft signed by Defendant, St. Louis, at Montreal, in favor of J. J. Gibb, endorsed by the latter, and drawn upon Sévère Dumoulin, of Three Rivers, agent of the Bank of Upper Canada. At this time, Dumoulin was also president and treasurer of the company, and the draft expressed that it was on account of the steamer " Ottawa." This draft was protested for non acceptance, because, as Dumoulin stated in his evidence, it was irregularly drawn upon him, as agent of the Bank of Upper Canada, instead of as president of the navigation company, and that, moreover, he had forewarned Defendant St. Louis not to draw upon him. Shortly afterwards, on the 16th December, 1858, Defendant, St. Louis, made his note in favor of Defendant, Senécal, for $250, payable one month after date, to retire the protested draft upon which the insurance money had been paid. It was also proved that subsequently to this, on the 12th January, 1859, Defendant St. Louis had, at Three Rivers, represented to his coassociates, the private prosecutors, Louis Édouard Pacaud and Sévère Dumoulin, that he had to give this note for $250 to Defendant Senécal, to obtain the $200 required to pay the protested draft, and that Defendant Senécal said, at the time, that it was Mailhot, a broker of Montreal, who had discounted the note and charged $50 for so doing; and that Mailhot had requested Senécal to collect the note, to have it protested, and to enforce payment by action at law, if not paid otherwise; that the vessel had in fact been insured by St. Louis, that $250 premium had been obtained by means of the draft, and applied to that purpose, also that such a note had been given by St. Louis to Senécal, that the latter was in possession of it, and that the protested draft had been actually retired. Pacaud represented to St. Louis that he had acted improperly, but, that, as he had done so to save the credit of the company, the amount would be repaid. It was also proved that, on the 13th January last, the sum of $225.35c. was paid to Defendant St. Louis, in the absence of the other Defendant, by Dumoulin, one of the coassociates, and the person named in

the indictment, out of the funds in his hands belonging to the company, upon the check of Louis Edouard Pacaud, at that date president of the company, which was unincorporated, and that the money so paid was as much the property of Defendants as it was that of their copartners and coassociates in the company. It was further shew by the testimony of Mailhot, the Montreal broker, that he had never discounted the note in question, had never seen it before, and had never charged a discount of $50 for cashing the same; and, by the testimony of other witnesses, it was established that Defendant Senécal, three or four weeks after the payment of the money to St. Louis, admitted that he was the person who had discounted the note and charged $50 for so doing. The false pretences relied upon by the prosecution were the false representation that Mailhot was the person who had discounted the note, had charged $50 for so doing, and had authorised him, Senécal, to collect the amount of the note. At the trial, upon a notice given by the prosecution to Defendant St. Louis, a register was produced, in which were recorded the proceedings of the committee of management, and, from these, it appeared that, on the 11th January last, the committee held a meeting, when the following resolution was passed. " Il est résolu que la somme de $255. 35 due pour le premium d'assurance jusqu'au 4 décembre prochain, soit chargé contre les dépenses, et payée à même les recettes de l'année courante." It was also proved that, at this meeting, Senécal stated that he had been obliged to pay $50 to Mailhot, to discount the note; that he, Senécal, took the note from his pocket and said he was employed to collect it; and, further, that the money was paid upon his representation. A witness named Wurtele, who was also a member of the company, testified that the resolution referred to was passed to authorise the payment of the note in question, and the costs of protest and interest upon the protested draft. The prisoners' counsel urged following objections: firstly, that the money obtained being the common property of the copartners and coassociates in this undertaking, the prisoners, being copartners, could not be amenable to a criminal charge, for obtaining a portion of this money under false pretences, from their coassociates in this unincorporate company; secondly, that the false pretences proved, under the circumstances of the case stated, were not such as to sustain a criminal charge for obtaining money under false pretences; thirdly, that it was necessary, upon the indictment as framed, that there should have been evidence of a false token having been used, the indictment not concluding " against the form of the statute;" fourthly, that the evidence was not sufficient to justify the conviction of both Defendants, failing

as it did to establish that Defendant Senécal was present when the money was actually paid to St. Louis.

The learned judge overruled the objections, and charged the jury generally, leaving them to find whether false pretences had been used by the prisoners to obtain the money, and whether it had been obtained by such false pretences. The jury returned a verdict of *guilty* against both prisoners, and at the request of their counsel, the learned judge respited sentence, and reserved the case for the opinion of the judges of the Court of Queen's Bench.

CARTER E., for the prisoners, contended that the first objection was fatal, inasmuch as it was established, by the evidence, that the money obtained was the money of the company, of which the prisoners were coassociates with others, and, therefore, was as much their joint property as that of their coassociates or copartners in the company, and that, consequently, they could not be guilty of larceny, or of obtaining money under false pretences from the company, being joint owners, with their coassociates, of the property and funds of the company ; (1) that the article stolen or obtained by false pretences must be the property of another or others ; (2) that, where the property is laid in A and others, and these others include the prisoner, there is no indictable offence ; (3) ; that, therefore the property in the present case, being the joint property of the prisoners, there was no larceny and no indictable offence for obtaining money under false pretences, and the conviction was, consequently, bad, according to all the authorities cited. That the second objection was equally fatal, because at the time the money was obtained, there was no false pretence made use of at all, and Senécal, one of the prisoners, was not even present when the money was paid, and that, if any false pretence was used, it was at the meeting of the committee of management, when the check, and not the money, was given, but this would not support the charge of which the prisoners were convicted, that of obtaining money under false pretences ; it might have been made the ground of a charge for obtaining a valuable security. The Chief Justice here intimated that the court was desirous

(1) Archibold's *Pldg. and Ev.*, p. 276 ; 2 East, *Pleas of the Crown*, c. 16, p. 358 ; 1 Hale's *Pleas of the Crown*, p. 513.

(2) 3 Bosanquet and Puller's *Reports*, p. 108 ; 8 Carrington and Payne, p. 196 ; 8 Adolphus and Ellis, p. 481 ; Archibold's *Pldg. and Ev.*, pp. 392, 393 ; Russell and Ryan, *Crown Cases*, p. 478 ; and the case of *Rex* vs. *Willis*, 1 Moody's *Crown Cases*, p. 375.

(3) *Rex* vs. *Danger*, 3 *Jurist*, New Series, p. 1012 ; *Regina* vs. Watson, 4 *Jurist*, New Series, p. 15 ; 16 *English Law and Equity Reports*, p. 375.

of hearing the learned counsel's adversaries, before he proceeded any further.

ANGERS, for the prosecution, argued that the authorities cited on behalf of the prisoners did not apply inasmuch as they all referred to cases where the money taken was in the possession of the society, and not as in the present instance, in the possession of the treasurer of the society; in those cases, therefore, there could be no taking; but, in the present case, where the monies were not in the possession of the company, but, on the contrary, were in the hands of a treasurer or guardian, the prisoners in obtaining the money from the treasurer, by false pretences, had committed an indictable offence. The false pretences were made at the meeting of the committee of management, by stating that one Mailhot had discounted the note for $50, which was false, and by which false representation the money was paid; that this false pretence having been made by the two prisoners, although only one of them was present when the money was paid, yet, they were both liable on a charge of having obtained the money by false pretences; (1) that the false pretences made use of by the prisoners constituted the crime of which they had been convicted. (2)

STUART, G. O., Counsel for prosecution, said that the objection that the prisoners were joint owners was one of which they could not avail themselves, for the reason that the monies which they had obtained were in the possession of a particular person, who was the custodian of the funds of the society, and responsible for their preservation, and that the monies were consequently not in the possession of the society, and that the prisoner having obtained the money from this person by false pretences, were rightly convicted. (3)

AYLWIN, Justice: The false pretence charged against Defendants, as stated by the learned judge who presided at the trial, was not that St. Louis said anything, but that Senécal, at the meeting of the committee, said the note had been discounted at Montreal, and that he had paid Mailhot $50 to have it cashed. There is not one title of evidence as to St. Louis having made any false representation, and, as to that made by Senécal, it is at most but a deceit, and does not amount to a false pretence. There is nothing to shew that the $50 had not been applied by Senécal to the common benefit; but, whether or not, it is now useless to inquire. Mr. Pacaud, it appears, undertook to censure St. Louis for his conduct, in

(1) 2 Russell, pp. 308, 309 and note.

(2) Archibold, *P. C.*, p, 247, *Rex* vs. *Wavell.*

(3) Roscoe, *on Ev.*, pp. 625, 463.

the matter, but it is uncertain whether St. Louis had not as much right to censure him. There is no evidence to show that St. Louis opened his mouth about the note, and, on the other hand, it is not shewn that Senécal ever had the check or any control over it, or ever took the money received from Dumoulin, or any portion of it. The learned judge who presided at the trial, stated four questions for the decision of this court, but in disposing of the first and second the court disposes of the whole matter. The first point raised is whether persons, themselves members of a company, can be made answerable under indictment for obtaining a portion of the monies of the company from their coassociates ; and the second, as to whether there is anything to shew that the offence of obtaining money under false pretences has been committed. On both these points there can be little doubt. Each of Defendants is interested in the company, in the same manner as the prosecutors, and the authority of *Rex* vs. *Willis*, 1 Moody, 375, cited by Defendant's Counsel, in which it was held that stealing by the wife of a member of a friendly society, money of the society deposited in a box, in the husband's custody, kept locked by the stewards, is no larceny, is consistent with the view which the court takes of this case. As to the second question, it is satisfactory to me to be able to say that I am of opinion there has not been any false pretences proved. Senécal did nothing else than make use of what is termed a naked lie as contradistinguish from a false pretence, and had I presided at the trial, I would not have compelled Defendants to enter upon their defence, but would have stopped the case at the close of the evidence for the crown. Of course, I do not mean to say that the transaction which has given rise to the prosecution is correct or moral, but between the obtaining of $50 by usury, and the obtaining of that amount by false pretences, there is a great and material difference.

Sir L. LAFONTAINE, Bart., Chief-Justice : I am of opinion that the conviction ought to be quashed. The Defendants being members of the company had a joint property in the money obtained, and could not be made amenable to a criminal charge any more than the wife in Willis' case. The recent statute 22 Vict., c. 2, does not reach a case of this description.

[illegible], Justice : I cannot take the same view of this case, as that taken by the learned judge who spoke first. I am convinced that there is moral guilt on the part of Defendants, and that they have not merely committed what is termed a naked lie ; but it is another question, as to whether they are legally guilty of a criminal offence. The Defendants, as copartners could not be indicted for obtaining the moneys of the

partnership, which belonged to themselves as much as to the prosecutors. Taking the law as it stands they have not been rightly convicted, but the legislature might very properly interfere and enact a law to meet a case of this description.

MONDELET, C., Justice : Not being called upon to decide as to the moral guilt of Defendants, but only as to whether they are guilty in the eye of the law, I am also of opinion that the conviction is bad, and must be quashed upon the grounds already stated. Conviction quashed. (10 *D. T. B. C.*, p. 34.)

CARTER, E., for Defendants.

STUART and ANGERS, Counsel for Prosecutors.

ACCUSATION POUR PARJURE.—PROCEDURE.

QUEEN'S BENCH, CROWN SIDE, Quebec, 7th February, 1860.

Before DUVAL, Justice.

REGINA *vs.* MAXWELL.

Jugé : Que, sur accusation pour parjure, le Défendeur doit se présenter et se soumettre à la juridiction de la cour, avant qu'il lui soit permis de plaider à telle accusation.

The grand jury having found a " true bill," on an indictment for perjury against Defendant, and application having been granted for the issuing of the process of the court to take his body, Holt appeared, and, on his behalf, moved for leave to plead " not guilty " to the indictment, alleging, that although in cases of felony, the party indicted must first appear before being allowed to plead, yet that, in cases of misdemeanor, the rule was different (1).

POPE, T.: Against the motion, said that the authorities cited established the contrary doctrine ; that they had reference to a stage of the proceedings subsequent to the surrender of Defendant ; that the motion before the court was, " for leave to put in a plea of not guilty, and that the trial take place *instanter*," and that neither portion of this motion could be granted ; that the authorities cited were decisive on both points ; that Defendant must first surrender himself and submit to the jurisdiction of the court, in cases of misdemeanor as well as in felony, before being allowed to plead, or obtain any favor from the court (2) ; that, after Defendant had surrende-

(1) 1 Chitty's *Criminal Law*, pp. 279, 280, 297 ; Archbold's *Pleading and Evid.*, pp. 111 and 112.

(2) 1 Chitty's *Criminal Law*, pp. 337, 338, 339, 343, 345, 346, 411.

red, all the consequent proceedings could be conducted in his absence by counsel, as well with respect to pleading as to trial, but that the privilege to do so only began after the arrest of Defendant, or after he had given bail (1).

DUVAL, Justice: The first thing Defendant had to do was to submit to the jurisdiction of the court, before he could be allowed to plead to the indictment or to have a day fixed for his trial; the authorities cited by counsel on both sides clearly laid down this rule; and it was a wise rule, otherwise, supposing Defendant were found guilty the sentence of the court could not be carried into execution, in consequence of his absence, perhaps in a foreign country, whence he might never return, and, in consequence of his not having put in bail; the Defendant could not, therefore, be allowed to take any proceedings in court, until after he had submitted to the jurisdiction of the court. (10 *D. T. B. C.*, p. 35.)

HOLT and IRVINE, for Defendant.

POPE, T., for Prosecutor.

PROCEDURE.—DECLARATION.

CIRCUIT COURT, Québec, 23 février 1860.

Before STUART, Asst.-Judge.

LABBÉ *vs.* MCKENZIE.

Jugé : Qu'un Demandeur portant une action pour le recouvrement du montant d'un compte reconnu et admis, sera tenu, nonobstant sa déclaration qu'il procède entièrement sur la reconnaissance, de produire un compte de particularités. (2)

This was an action brought to recover £20 10 0, and the particulars of the demand were as follows: 1859, décembre, pour balance de compte reconnu et admis, £20 10 0.

VANNOVOUS, for Defendant, applied for further particulars. He argued that, with the particulars furnished, it was impossible to know whether the debt was of a nature to be recovered. It might be a gaming debt, or some other, which it was not the policy of the law to recognize as a recoverable debt. In an action brought on an account stated and settled, the whole account must be produced, and evidence of a stating

(1) *Rex* vs. *Carlisle*, 6 Car. and P., p. 628; *Regina* vs. *Badger*, 7 Jurist., 216; *Rex* vs. *Wilkes*, 2 Wilson's *Reports*, p. 151; *Rex* vs. *Spencer*, 1 Wilson's *Reports*, p. 315; *Regina* vs. *Minshall*, 8 Car. and P., p. 576; *Regina* vs. *Trenfield*, 8 Car. and P., p. 284; Archbold's *Criminal Pleading*, p. 67.

(2) V. Art. 50 C. P. C.

would not suffice to support it. If these particulars were admitted, the statute of limitations could be readily eluded, and a debt prescribed and requiring a promise in writing for its revival, might be recovered upon evidence of a verbal admission. A Defendant would be placed in a most embarrassing position, as his means of defence, in most cases, would be limited to a denial of the admission, without knowing the cause of debt, and the court would be at a loss to settle whether the french or english rule of evidence should apply. The Defendant could not readily plead a *res judicata*.

GLEASON, for Plaintiff, relied upon the practice which had permitted actions to be brought in this way, and said that Plaintiff proceeded exclusively upon the aknowledgment.

The court ordered further particulars. (10 *D. T. B. C.*, p. 77.)

FOURNIER and GLEASON, for Plaintiff.

VANNOVOUS, for Defendant.

NUISANCE.

QUEEN'S BENCH, CROWN SIDE, Montreal, 24 mars 1860.

Before AYLWIN, Justice.

REGINA *vs.* BRUCE.

Jugé : 1° Que, dans l'espèce, " un témoignage pour constater l'avantage résultant, ou qui pourrait résulter, au public en général de la vente et de l'usage d'un article manufacturé, ne pouvait être admis, en autant qu'il est réglé que le fait que la chose dont on se plaint est sur le tout plus commode au public que les inconvénients dont on se plaint, n'est pas une défense à une accusation pour une nuisance "

2° Que la règle, *sic utere tuo ut alienum non lædas*, qui nous enjoint de jouir de ce qui nous appartient de manière à ne faire tort à personne, est une maxime familière du droit commun de l'Angleterre, aussi bien qu'une maxime du droit civil.

3° Que dans le Bas-Canada, où la Cour est présidée par un seul juge, *in banco*, et jamais par plus de deux, la motion pour un nouveau procès dans les cas de *misdirection* devient impraticable.

AYLWIN, Justice : In this case, which was tried in October last, Defendant was convicted of a nuisance, in setting up and carrying on a manufactory of animal manure, in the Quebec suburbs, near the common gaol of the district, and a motion was made to set aside the verdict, and for a new trial. The grounds stated on behalf of Defendant, are : 1st, The rejection, by the judge who presided at the trial, of evidence to prove the advantage accruing, and likely to accrue, to the public at large, from the sale and use of manufactured animal manure ; 2nd, misdirection, in declaring that the rule, or

one of the rules by which the jury should be guided was contained in the maxim, *sic utere tuo ut alienum non lædas*, importing, thou shalt not use what is thine, in such wise as to injure or annoy the neighbour, which maxim was one of the civil law, and not one of the rules of the criminal law of England ; 3rd, misdirection, in declaring that the testimony on behalf of Defendant, by several witnesses residing in the neighbourhood of the factory, to the effect that they had suffered no discomfort or annoyance, in or about their respective residences, from certain odours, proceeding from the factory, was not of equal weight as the testimony of certain other witnesses produced and examined on behalf of the prosecution, who swore that they had suffered annoyances and discomfort from the said odour, although some of them lived at a greater distance from the factory than the witnesses for the defence, and in declaring that the evidence so adduced by Defendant was merely negative, while the testimony for the prosecution was affirmative ; 4th, that the verdict was rendered contrary to law, evidence and justice. The application for a new trial, on the ground of misdirection, having raised an important question of practice, it was deemed proper specially to call the attention of all the judges of the court to it, in order to the establishment of uniformity of decision in the several districts, and judgment is now to be delivered in the premises. The judges are unanimously of opinion that no such motion can be entertained. This court sits in bank, and, by the 32nd section of the statute of the 12 Victoria, cap. 37, one judge forms a quorum, and exercises all the power and authority of the full court, composed of all the Judges. The proceedings of the court in bank, are, therefore, not more susceptible of revision, or examinable in the shape of a motion for a new trial, when had before one judge, than before two, three, four or the whole court. In treating of new trial, in England, Chitty, *Criminal Law*, vol. 1, p. 659, says : "When the application is regularly made in court, upon grounds *primâ facie* sufficient, they will award a rule to shew cause why a new trial should not be granted. On this the puisné judge of the court applies to the judge who tried the cause, unless he were one of the judges of the court, for a report of the trial and a statement of his opinion respecting its merits. If he signify his dissatisfaction, the remedy prayed for is usually allowed ; if he declare his concurrence with the verdict, it is commonly refused ; but, if he merely report the evidence, without giving any decided and satisfactory opinion, the court will admit the question to be argued before them." In Lower Canada, where this court is held before one judge, and never before more than two, the motion for a new trial in

cases of supposed misdirection, becomes impracticable. If such a motion could be received at all, it would paralyze the court, and in the outlying districts, such as Three Rivers, St. Francis, Ottawa and Kamouraska, where, regularly, only one judge can sit, the party accused would virtually have an appeal in every case, and the respite of one or more terms, at his own pleasure. Inconvenience it is true might arise from the want of a new trial, in particular cases, but whenever reasonable doubt shall exist, it is to be expected that the judge will be ready to state a case for the opinion of the Court Criminal Appeal as lately constituted, and, in this shape, redress will be afforded. In the present instance, there is nothing to authorize a reference to the Appeal side of the Court. As to the first ground stated in the motion, as a misdirection of the judge: "It is now settled that the circumstance, that the thing complained of furnishes, upon the whole, a greater convenience to the public than it takes away, is no answer to an indictment for a nuisance." (1) As to the second ground of supposed misdirection, it is wholly unfounded, inasmuch as the rule *sic utere tuo ut alienum non lædas*, which directs us to enjoy our own property in such a manner as not to injure that of another, is a familiar maxim of the common law of England, as well as a maxim of the civil law. (2) The pure morality of this beautiful rule would secure its introduction into the law of every christian land, and it is not less english than it is roman. Its application to nuisance is direct and manifest. As to the two remaining ground, it will suffice to say that it was put to the jury to pronounce if the business carried on by Defendant was productive of smells offensive to persons passing along the public highway, and to the inmates of the common gaol. (3) The distinction between affirmative and negative testimony was pointed out to the jury in the judge's charge, and they were distinctly told that it was for them exclusively to weigh the testimony on both sides, and to determine which preponderated. No opinion was expressed by the judge upon the merits, but it has been held that "where verdict is consistent with justice, a new trial will not be granted on account of a strong expression of opinion on the part of the judge, as to the merits." (4) The prox-

(1) Roscoe's Evidence in Criminal cases, p. 177, Ward's case; 4 A. and E., 384; *R.* vs. *Morris*, 1 B. and Ad., 441; *R.* vs. *Randall*, Carr and M., 496; *Archbold's Criminal Pleading*, 746; *R.* vs. *Tindall.*, 1 Nev. and P., 719; 6, Adol. and E., 143; *Reg.* vs. *Betts*, 2 E. and B., 1023.

(2) See *Broome's Legal Maxims*, 161-172, and the numerous cases there cited.

(3) See *Rex* vs. *Reid*, 2 C. and P. 485.

(4) 1 Burr, 54; 2 Salkeld, 644, 6, 8, 653; 1 *Chitty's Criminal Law*, 657.

imity of the manufactory to the common gaol, and the necessary exposure of the inmates of this crowded building to the consequences of offensive smells, make the case additionally important to the public. Again, the nature of the thing manufactured, that is animal manure into which the offal of cattle is converted by a very ingenious contrivance, is not to be lost sight of. Notwithstanding the value of the process, it is plain that it is not one which ought to be carried on in such a thoroughfare as the Quebec suburbs, near the gaol. The verdict of the jury was supported by the evidence, and there is no reason to be dissatisfied with it, it met the justice of the case. " And it is general rule that, even where grounds are laid, which in general are sufficient, a new trial will not be granted to encourage a disposition to litigate, or unless it is necessary, in order to obtain substantial justice." The order must go that Defendant take nothing by the motion. As the voluntary discontinuance of a nuisance always has an influence in the award of judgment, the case will be directed to stand over till the next term. (10 *D. T. B. C.*, p. 117.)

JOHNSTON, Q. C., for Prosecution.

DRUMMOND, Q. C., for Defence.

MUR MITOYEN.—EXHAUSSEMENTS,

COUR SUPÉRIEURE, Montréal, 27 février 1858.

Coram SMITH, J.

TAVERNIER *vs.* LAMONTAGNE.

Jugé : Que le voisin qui se sert des exhaussements du mur mitoyen faits par son co-voisin, est tenu de lui payer la moitié du prix et valeur de ces exhaussements.

Le Demandeur, par sa déclaration, alléguait :" Que, par acte de vente fait à Montréal, devant Lamontagne, notaire (qui est le Défendeur) et son confrère, le 17 octobre 1850, Laurent Dufresne, Marie Adelaïde Lamontagne, curatrice de sieur Luc Dufresne, son mari, reconnurent avoir vendu, pour le prix de £14 9s. 3d. payé au Demandeur le droit de mitoyenneté dans le mur de séparation ou pignon d'entre la propriété des sieur et dame Dufresne et une autre propriété adjacente appartenant au sieur Tavernier, située sur la grande rue du Faubourg St-Laurent de la ville de Montréal, le droit de mitoyenneté comprenant tant le dit mur que le terrain, jusqu'à concurrence de neuf pouces de largeur, sur trente-deux pieds de profondeur, sur lequel il se trouve construit ; qu'il fut de plus

entendu que le Demandeur se réservait tous ses droits dans les exhaussements qu'il ferait au mur ou pignon, et qu'il devait faire faire à ses propres frais, et que la moitié devait lui en être payée quand les sieur et dame Dufresne viendraient à en faire usage ; que le Demandeur a bâti subséquemment une maison sur le terrain voisin du terrain des sieur et dame Dufresne ; qu'en ce faisant, il s'est servi du mur mitoyen qu'il avait acheté, mais qu'il a fait sur le mur des exhaussements d'une valeur considérable, et qu'il a fait en arrière du mur mitoyen une prolongation de ce mur ; que, par bail à loyer, fait à Montréal, le 9 avril 1855, devant Weekes et son confrère, notaires, Laurent Dufresne donna à loyer, pour le terme de quinze années à compter du 1er mai 1855, au Défendeur "un lot de terre vacant, situé dans cette cité de Montréal, au quartier St-Laurent, avec des ruines d'une maison en pierres incendiée, qui se trouvent sur le terrain ;" laquelle maison est la même que celle par rapport à laquelle le Demandeur avait acheté le droit de mitoyenneté, et dont le mur était devenu mitoyen avec le Demandeur, sur lequel mur ce dernier a fait les exhaussements ci-dessus mentionnés ; que, par ce bail, fait pour £10 0 0 pour les cinq dernières, le Défendeur s'obligea de faire élever, sur le terrain, des bâtisses en briques ou en pierres de la valeur de cinq à six cents livres, et, à la fin du bail, le bailleur aurait le droit de garder ces bâtisses, en payant deux cent livres d'indemnité au Défendeur ; et, au cas contraire, mais à l'option du bailleur, le Défendeur devait garder les bâtisses, payer six cents louis au bailleur et devenir propriétaire des bâtisses et du terrain ; que le Défendeur a, en conformité du bail, érigé une maison et dépendances ; qu'il s'est servi, non seulement du mur mitoyen entre le Demandeur et lui, mais, encore, des exhaussements faits par le Demandeur dans la cour ; qu'ainsi il est tenu de payer pour la moitié de la valeur des exhaussements et prolongation de mur dont il se sert, la somme de £31 10s. 6d. qu'il doit au Demandeur.

Le Défendeur contesta cette demande, alléguant que le mur sur lequel les exhaussements ont été faits par le Défendeur appartenait d'abord tout entier, avant le 1er octobre 1850, à Laurent Dufresne et Luc Dufresne, ainsi que le terrain sur lequel se trouvait construit le mur ; que le mur formait alors le pignon d'une maison, lequel pignon a trente-deux pieds de profondeur, de plus, se prolongeait, comme il se prolonge encore, comme mur de séparation assis entièrement et exclusivement sur tout le terrain appartenant aux sieurs Dufresne, et dans laquelle prolongation conséquemment le Demandeur n'a aucun droit de mitoyenneté ; que ce ne fut que le 17 octobre 1850, que le Demandeur a acquis un droit de mitoyenneté

dans cette partie seulement du mur qui formait le pignon de trente-deux pieds de profondeur, jusqu'à concurrence de neuf pouces seulement; que c'est par le dit acte, que le Défendeur a reconnu qu'avant cette époque tout le mur appartenait aux sieurs Dufresne, et était bâti entièrement sur leur terrain; que le Défendeur, qui était aux droits des sieurs Dufresne, était en droit de faire des exhaussements sur le pignon; attendu qu'il est mitoyen entre lui et le Demandeur, et que les exhaussements que le Défendeur a ainsi faits l'ont été sur l'ancien pignon, et sans se servir d'aucun des exhaussements faits par le Demandeur, lesquels d'ailleurs, ont été construits de manière à ne pouvoir servir aucunement au Défendeur; que le Défendeur était en droit de se servir du mur de séparation ou de clôture qui existe sur le terrain des sieurs Dufresne, d'aucune manière que ce puisse être, mais on se sert pas néanmoins d'icelui, et nie de s'en être jamais servi; que le Défendeur ne s'est jamais servi d'aucun exhaussement fait par le Demandeur, et qu'il avait le droit de se servir de la prolongation du mur, (supposé qu'il l'eût fait, ce qu'il n'a jamais fait néanmoins) et que, pour ce, il ne doit rien au Demandeur qui ne peut exercer aucun recours en loi, contre le Défendeur, attendu que le Défendeur n'a fait que ce que tout propriétaire a droit de faire sur son propre sol; que le Demandeur n'a pas exhaussé le pignon dans toute sa largeur, mais seulement pour une largeur d'environ neuf pouces; que le Défendeur était bien fondé à faire des exhaussements sur le restant de la largeur du mur; que partant le Défendeur n'a fait qu'user du droit qu'a tout propriétaire, de bâtir sur le sol qui lui appartient.

La cour considéra qu'il était établi, par l'enquête, que le Défendeur s'était servi des exhaussements faits par le Demandeur, quant au pignon seulement, et condamna le Défendeur à payer (1) la moitié de la valeur.

" La cour condamne le Défendeur à payer au Demandeur la somme de £6 11s. 0d. prix et valeur du mur de séparation ou pignon d'entre la propriété de sieur et dame Dufresne et une autre propriété adjacente, appartenant au Demandeur, située sur la grande rue du faubourg St-Laurent, de la ville de Montréal, le Demandeur ayant acquis le droit de mitoyenneté dans le mur, par acte de vente entre lui et Laurent Dufresne, devant maître Lamontagne et son confrère, notaires publics, le 17 octobre 1850, et le Défendeur s'étant servi du mur pour bâtir sur le terrain adjacent, suivant un certain bail

(1) Vide Pothier, *Contrat de société*, 1er appendice, No 201; Merlin, *Rép.*, vo *Mitoyenneté*, page 346; Pardessus, *Des servitudes*, 1. vol., p. 346, No 153: Cout. de Paris, article 198; Duplessis, p. 124, liv. 2, ch. 4; Desgodets, Ed. 1787, p. 155, No. 5, p. 192, No. 12.

à loyer à lui consenti par Laurent Dufresne, par acte devant Maître Weekes et son confrère, notaires publics, le 9 avril 1855, avec intérêt sur la somme de £6 11s. 0d. à compter du 17 janvier 1857, jour de l'assignation, jusqu'au paiement, et aux dépens, comme dans une cause de la cour de circuit." (4 *J.*, p. 81.)

LORANGER, POMINVILLE et LORANGER, Avocats du Demandeur.

LAFRENAYE et PAPIN, Avocats du Défendur.

FOLLE ENCHERE,—PROCEDURE.

SUPERIOR COURT, Montreal, 29th February, 1860.

Coram SMITH J.

DICKENSON *vs.* BOURQUE and BLANCHARD, Adjudicataire, *Mis en cause.*

Held: That a rule *nisi* for *folle enchère* must contain a description of the lands asked to be resold *à la folle enchère.* (1)

The *Adjudicataire* having failed to pay the purchase money, on motion of Plaintiff's attornies, a rule was obtained for a *folle enchère nisi causâ.* The rule referred to the lands as being described and specified in the sheriff's return and the *procès-verbal* of seizure thereto attached, by him made to the writ of execution, but did not contain a special description of the lands. The court discharged the rule, holding that the rule should contain a description of the lands. (4 *J.*, p. 119.)

TORRANCE and MORRIS, for Plaintiff.

COMMISSAIRES D'ECOLES.—ACTION EN REDDITION DE COMPTES.

SUPERIOR COURT, Montreal, 30th September, 1859.

Coram SMITH, J.

LES COMMISSAIRES D'ECOLES POUR LA MUNICIPALITÉ DE LA PAROISSE DE ST-MICHEL DE VAUDREUIL *vs.* BASTIEN.

Jugé: 1° Que les commissaires d'écoles sont tenus de respecter les résolutions de leurs prédécesseurs en office;

2° Qu'une action en reddition de compte ne peut pas être portée, sans

(1) V. art. 690, C. P. C.

aucun allégué de fraude ou erreur, dans le cas où une décharge a été précédemment donnée.

3° Que, par la 12 Vict., ch. 50, sec. 12, le surintendant de l'instruction publique a le droit de régler les différends de cette nature, et que son jugement a l'effet d'une sentence arbitrale. (1)

Les Demandeurs poursuivirent le Défendeur, qui avait été leur secrétaire-trésorier, par une demande en reddition de comptes pure et simple, sans alléguer que, lors de la remise des livres par le Défendeur, et du paiement qu'il avait fait à leurs prédécesseurs en office de la balance des deniers dont il était comptable, lors de sa sortie de charge, le Défendeur les avait fraudés, ou que, par erreur, il s'était glissé des omissions dans sa reddition de compte à l'amiable faite entre eux. Le Défendeur plaida : " qu'il a remis entre les mains des Demandeurs, tous " livres, papiers comptes, reçus et documents qu'il avait eus " en sa possession, pendant la durée de sa charge comme secré- " taire-trésorier, et ce sur la demande des Demandeurs, et ainsi " le Défendeur se trouve sans documents ou reçus, lesquels sont " en la possession des commissaires, et ont été acceptés par " eux, sur reddition de comptes du Défendeur ; que, par les lois " scolaires, le Défendeur, comme secrétaire-trésorier, était " tenu de rendre publiquement ses comptes aux contribuables " de la municipalité, ce qu'il a fait chaque année et qu'ensuite " les commissaires d'écoles en charge, ont reçu et excepté les " comptes, comme corrects, justes et bien fondés, ce qui résulte " des documents ou rapports de délibérations de la dite corpo- " ration scolaire, dont le Défendeur produit copies, comme " ses exhibits, au soutien des présentes, et que chaque fois et " chaque année, les comptes du Défendeur ont été régulière- " ment acceptés par les commissaires, et valablement rendus " par le Défendeur ; que tous les comptes étaient expliqués lors " de la reddition d'iceux et que les commissaires les acceptaient, " de même que les autorités scolaires dans le pays ; que les " Demandeurs ne peuvent revenir contre l'acceptation des " comptes régulièrement faite par la commission qui les rece- " vait et était alors en charge, et que, si les Demandeurs ou " commissaires alors en charge ont accepté, comme ils l'ont fait, " les comptes et les ont ainsi reçus, et s'ils ont reçu ou accepté " comme légales des charges ou dépenses réellement faites, " mais non autorisées par les lois, ils doivent s'en attribuer la " faute, et non la faire retomber sur le Défendeur qui, lui, " agissait sur leur ordre et autorisation et n'a pas fait de frais, " d'ouvrages ou des déboursés, ou n'a payé des argents que " sur l'ordre des commissaires alors en charge qui, ensuite, ont " accepté ses comptes, après que le Défendeur en eut donné

(1) V. art. 2121, S. R. Q.

" connaissance aux contribuables, en les lisant et les faisant " connaître à la paroisse, conformément à la loi ; que les commissaires, alors en charge, avaient droit d'ordonner toutes les " dépenses que le Défendeur chargeait, et avait le droit de les " recevoir et accepter comme valables et légales, et ordonner " le paiement, à même les fonds scolaires, et le fait de l'acceptation des comptes est une preuve valable et suffisante de " leur autorisation."

SMITH, J. : This is an action brought by the School Commissioners of the parish of Vaudreuil, against their ex-secretary-treasurer, for monies by him had and received for their own use. The accounts of Defendant have already been approved and a discharge has been obtained by him from the former commissioners. Plaintiffs form a corporation, which by election, has perpetual succession. The first point to be considered is whether Plaintiffs are bound by the acts of their predecessors ? It cannot be doubted that they are, and that, if the discharge which has been given to the Defendant is good, it must be good against all. The second point to be considered is whether there are such circumstances in this case as would justify to reopen and set aside the account which has been rendered and accepted, but Plaintiffs' declaration do not state fraud or error. Plaintiffs have sued Defendant by a direct action for moneys had and received for their benefit. There is no allegation that Defendant has moneys in violation of any clause of the statute. There should be, at all events, a precise allegation of his having received a particular amount not stated in the account rendered. It should have been a special action. A third point to be considered is, whether, by the 12 Vict., ch. 50, sec. 12, the superintendent of schools had a right to settle disputes on such matters, and whether his decision is not in the nature of a judgment or *sentence arbitrale*. Now, in the face of this statute, can these suitors come before the courts of justice when another tribunal exists for the decisions of such difficulties, namely before the superintendent of schools, whose office is created by law ? I am disposed to think that they cannot do so. The action, upon these grounds, must be dismissed. (4 *J.*, p. 123.)

CHERRIER, DORION et DORION, Avocats des Demandeurs.
OUIMET, MORIN et MARCHAND, Avocats du Défendeur.

Vide 6 *R. J. R. Q.*, p. 21, the *School Commissioners of Chambly* vs. *Hickey*.

CORPORATION MUNICIPALE.—SECRETAIRE-TRESORIER.

COUR SUPÉRIEURE, Montréal, 17 septembre 1859.

Coram BADGLEY, J.

LA CORPORATION DU COMTÉ DE CHAMBLY *vs.* LOUPRET.

Jugé : 1° Que le secrétaire-trésorier d'une municipalité, sur son refus de rendre compte, doit être condamné au paiement du montant établi par la preuve de la Demanderesse avec intérêt à raison de 12 par cent et de plus contraint par corps. (1)

2° Que la règle pour obtenir une telle condamnation peut être signifiée au greffe dans le cas où ce secrétaire-trésorier a quitté la Province. (2)

La Demanderesse s'est pourvue en reddition de comptes contre le Défendeur, ci-devant son secrétaire-trésorier. Le Défendeur ne contesta pas l'action, en sorte que la Demanderesse ayant procédé *ex parte,* la seule question qui fut soulevée, lors de l'audition au mérite, par le Défendeur, fut de savoir si, en autant que le successeur du Défendeur n'avait pas été nommé par la même résolution qui le destituait, nonobstant le 3e paragraphe de la 14e clause de l'acte des municipalités et des chemins du Bas-Canada de 1855, 18 Vic., ch. 100, qui est comme suit : 3 " tout conseil aura le pouvoir de destituer tout officier nommé par lui, ainsi que tout officier nommé par le gouverneur n'étant pas membre de tel conseil, pourvu que, par la même résolution qui destitue tel officier, il nomme une autre personne à sa place, et non autrement " lui le Défendeur ne devait pas être considéré comme étant encore le secrétaire-trésorier de la Demanderesse. La cour, par son jugement interlocutoire, rendu le 31 mars 1859 (Berthelot J.) condamna le Défendeur à rendre le compte demandé, en observant que le Défendeur n'avait et était sans aucun intérêt à invoquer les dispositions contenues dans le susdit statut. Le 24 août 1859, la Demanderesse fit signifier au greffe de la Cour Supérieure, à Montréal, pour le Défendeur qui avait quitté le pays après le prononcé du susdit jugement interlocutoire, une règle conçue en ces termes : " vu que le Défendeur ne s'est pas conformé au jugement interlocutoire du 31 mars 1859, lui ordonnant sous un mois de la signification à lui faite du dit interlocutoire, de rendre à la Demanderesse un compte vrai exact et sous serment, avec pièces justificatives de la gestion et administration qu'il a eu des biens et deniers de la Demanderesse, depuis le 11 août 1855 au 5 février 1858, tant des

(1) V. art. 167 C. M.

(2) *Sed Vide*, 14 et 15 Vic., ch. 59, sec 3 ; 22 Vic., ch. 5, sec. 56.

argents qui lui ont été remis en mains par la Demanderesse, lors de son entrée en charge, que des argents dus avant son entré en charge, et qu'il a retirés depuis, ainsi que des argents qui sont devenus dus subséquemment, et par lui perçus et retirés pour la Demanderesse, pendant qu'il a été son secrétaire-trésorier ; et, vu que le Demandeur n'a point, depuis le délai expiré, rendu le dit compte, et vu la signification à lui faite du dit interlocutoire, par le ministère de Joseph Robert, un des huissiers de cette cour, le 6e jour d'avril 1859, la cour ordonne au Défendeur de comparaître, le 17e jour de septembre prochain, au palais de justice, en la cité de Montréal, à dix heures et demie du matin, cour tenante, pour, là et alors, donner ses raisons, si aucune il a, pourquoi, vu son défaut de rendre compte, il ne serait pas condamné à payer à la Demanderesse la somme de £246 8s. 4d. avec intérêt du 25 mai 1858, tel que réclamé par l'action de la Demanderesse, avec dépens tant de la dite action que des présentes ; et pourquoi il ne serait point contraint par corps au paiement de la dite créance. Et, à défaut par le Défendeur de comparaître, aux jour, heure et lieu susdits, il sera condamné à payer à la Demanderesse la susdite somme, avec intérêt et frais, et, au paiement de la dite créance, contraint par corps ainsi que demandé dans la dite motion. Cette règle fut déclarée absolue pour la somme de £96 8s. 3½d, montant établi en preuve par la Demanderesse comme ayant été reçu par le Défendeur durant sa gestion, avec intérêt au taux de 12 par cent, avec dépens, et la contrainte par corps fut accordée. (4 *J.*, p. 125.)

Leblanc et Cassidy, Avocats de la Demanderesse.

Lafrenaye et Papin, Avocats du Défendeur.

ENQUETE.

Cour Supérieure, Montréal, 30 décembre 1859.

Coram Badgley, J.

Lauzon *vs.* Stuart.

Jugé : 1° Que les renvois, dans une déposition, qui sont paraphés, quoique non mentionnés dans le jurat de la déposition, n'annulent pas la déposition. (1)

2° Que l'omission, dans la déposition, que le témoin n'est pas parent, ni allié de l'une ou de l'autre des parties au degré prohibé, emporte la nullité de la déposition. (2)

Le Défendeur fit motion que certaines dépositions fussent mises de côté : " Because said depositions contain erasures

(1) V. art. 252 et 295 C. P. C.

(2) Ord. 1667, titre 22, art. 14, 18 et 20.

" and marginal notes in material portions of said depositions, " which are not noted or certified in any manner in the *jurat* " to said depositions, respectively." Cette motion ne fut pas accordée. Le Défendeur ayant fait une autre motion que les dépositions de deux témoins entendus de la part du Demandeur, savoir, Joseph Proulx et Paul Lefebvre, fussent rejetées : " Because said witnesses appear, by the depositions, to be " related to Plaintiff, and to one of the parties in this suit, and " it is not shown that they were not related within the prohibited degree, and are therefore incompetent witnesses" ; cette motion fut accordée.

PER CURIAM : Le défaut de mention des renvois ou apostilles n'a pas l'effet d'annuler une déposition, pourvu que ces apostilles soient signées, au désir de l'article 18 de l'ordonnance de 1667, titre 22 des enquêtes. Mais l'omission de mentionner en quel degré le témoin est parent est fatale, car l'article 20 prononce la nullité dans un cas semblable. Les dépositions des témoins Proulx et Lefebvre sont rejetées. (4 *J.*, p. 126.)

RICARD, Avocat du Demandeur.

CARTER, Avocat du Défendeur.

SECURITY FOR COSTS.

SUPERIOR COURT, Montreal, 19th October, 1859.

Coram MONK, J.

DONALD *vs.* BECKET.

Held : That the interlocutory judgment of the court granting the motion of Defendant that a foreign Plaintiff shall give security for costs is only complied with by Plaintiff offering, as such security, the persons of *two* sufficient sureties. (1)

PER CURIAM : Plaintiff, being held to give security for costs, has offered, by his motion, to enter, as such security, the person of William Maxwell, who would justify if required. Defendant has resisted the motion, on the ground that the person of one surety is not a compliance with the law. My personal opinion is that the offer of Plaintiff should be held sufficient, but the practice of this court has been otherwise, and Plaintiff will, therefore, take nothing by his motion. Motion dismissed. (4 *J.*, p. 127.)

TORRANCE and MORRIS, for Plaintiff.

C. R. BEDWELL, for Defendant.

(1) V. art. 29 C. P. C.

FAITS ET ARTICLES.—ANSWERS VIVA VOCE.

SUPERIOR COURT, Montreal, 4th March, 1859.

Coram BADGLEY, J.

COLEMAN et al. *vs.* FAIRBAIRN.

Held: That a party in the cause who has been ordered to answer interrogatories *sur faits et articles vivâ voce*, under 20 Vic., c. 44, s. 86, will not be allowed to read his answers from a paper previously prepared. (1)

Defendant appeared, at the *enquête* sittings, to make answer, *vivâ voce*, to interrogatories previously served upon him, in the terms of 20 Vic., c. 44, s. 86, and, in making answer, Defendant attempted to make use of a paper on which he had previously written his answers. CROSS, for Plaintiff, objected to Defendant making use of the papers, in giving answer *vivâ voce* to the interrogatories, and his objection was maintained, and Defendant ordered to make answer, without reference to the paper. (4 *J.*, p. 127.)

TORRANCE and MORRIS, for Plaintiffs.

A. and W. ROBERTSON, for Defendant.

PEREMPTION.

SUPERIOR COURT, Montreal, 31st December, 1859.

Coram BERTHELOT, J.

FARNAN *vs.* JOYAL.

Held: That the fact of the rule for *péremption*, having been indorsed and intituled "*Louis*" *Joyal* in place of "*Lewis*" *Joyal*, was not a misnomer fatal to the proceeding.

On the 20th December, 1859, no proceedings having been had in the case during three years, Defendant, on the 20th, served a rule *nisi* for *péremption*, on this ground, returnable the 23rd December, upon Plaintiff's attorney; whereupon, the latter, on the 22nd, inscribed the cause for final hearing on the merits, on the 27th, the *enquête* having been duly closed on both sides. On the return day of the rule, TORRANCE, for Defendant, prayed that the rule might be declared absolute. NYE, for Plaintiff, resisted the application, on the ground

(1) V. art. 226 C. P. C.

that the rule was intituled in a cause "*Louis Joyal*," and the cause, before the court, was one wherein "*Lewis Joyal*" was Defendant.

PER CURIAM: I hold that the word "Louis" in place of "Lewis" is no misnomer, being *idem sonans*. The *péremption* is acquired. Rule declared absolute. (4 *J*., p. 128.)

T. NYE, for Plaintiff.
MACK and MUIR, for Defendant.
F. W. TORRANCE, Counsel.

DROIT D'ACCROISSEMENT.—LEGS.

COUR SUPÉRIEURE, Montréal, 29 février 1860.

Coram MONK, J.

DUPUY *vs.* SURPRENANT et al.

Jugé: Que, dans le legs d'une universalité de biens fait en faveur d'un mari et de sa femme, "pour appartenir (les dits biens) à la communauté de biens qui règne entre eux, et être considérés comme conquêts d'icelle," il y a lieu au droit d'accroissement en faveur du survivant des légataires, pour la part du prédécédé, si le prédécès a lieu du vivant du testateur. (1)

Le Demandeur se présentait comme cessionnaire des droits héréditaires de cinq des frères et sœurs d'Eric Surprenant, l'un des Défendeurs, et alléguait, dans sa déclaration: que Charles Surprenant et Marguerite Bazinet, père et mère des cédants et du Défendeur Surprenant, avaient acquis un certain immeuble; que, par son testament, en date du 4 mars 1843, Charles Surprenant institua Eric Surprenant et Marguerite Denaut, sa femme, ses légataires universels, dans les termes suivants (voir *infra* le jugement); que Marguerite Bazinet, par son testament, en date du même jour, a aussi institué Eric Surprenant et Marguerite Denaut ses légataires universels, dans les termes suivants (voir *infra* le jugement); que Marguerite Denaut mourut le 23 août 1845, et qu'après son décès Eric Surprenant fit faire inventaire de sa communauté avec elle, lequel fut clos le 9 janvier 1846; que Charles Surprenant mourut le 16 décembre 1846, et Marguerite Bazinet le 13 décembre 1856; que, partant, Marguerite Denaut a prédécédé les testateurs; que la communauté entre Eric Surprenant et elle a aussi été dissoute avant le décès des testateurs, et *que, partant, il y a eu caducité des legs faits à Marguerite Denaut, et que, par cette caducité, la moitié des*

(1) V. art. 868 C. C.

biens légués comme susdit est restée dans les successions des dits Charles Surprenant et Marguerite Bazinet; que Eric Surprenant ayant été institué légataire universel, et ayant recueilli ce legs, il ne doit rien appréhender dans la moitié des dites successions, qui doivent, en conséquence, être divisées entre les onzes autres enfants des testateurs parmi lesquels se trouvent les cinq cédants du Demandeur; que, dans les dites successions, est demeuré l'immeuble en question, dont la moitié a été léguée au dit Eric Surprenant et moitié à Marguerite Denaut, de sorte que les cédants du Demandeur ont été saisis chacun d'un onzième dans la moitié du dit immeuble; que, par acte du 1er avril 1859, Eric Surprenant a vendu la totalité du dit immeuble à Olivier Perron, l'autre Défendeur, pour la somme de 9,000 livres ancien cours, à compte de laquelle il reçut alors 2472 livres; quant aux 6528 livres restant, le dit acquéreur promit les payer aux vendeurs ou représentants, en six paiements annuels et consécutifs, dus et exigibles en mars de chaque année, à commencer en mars 1860; que Olivier Perron prit possession immédiate et jouit encore du dit immeuble; que le Demandeur, comme propriétaire des cinq onzièmes indivis, dans la moitié du dit immeuble, aurait le droit de revendiquer du dit Olivier Perron; mais qu'il se contente de réclamer cinq onzièmes dans la moitié du prix de vente, sur les paiements à échoir en mars 1860, 1861, 1862, 1863, 1864 et 1865, lesquels cinq onzièmes forment la somme de £85 4s. 6d. que le Demandeur a droit de réclamer, comme étant substitué aux droits du dit Eric Surprenant; en conséquence, le Demandeur concluait à ce qu'il fût déclaré subrogé aux lieu et place du dit Eric Suprenant dans la balance due sur le prix de vente jusqu'au montant de £85 4s. 6d., et à ce que défense fût faite au dit Olivier Perron de payer la dite somme à d'autres qu'au Demandeur, à peine de payer deux fois.

Eric Surprenant plaida, par une défense en droit, qu'en supposant que le legs fait à Marguerite Denaut fût devenu caduc, en conséquence de son décès advenu antérieurement à celui des testateurs, il n'en résultait aucun droit aux cédants du Demandeur, attendu que, par la loi, les choses léguées à Marguerite Denaut sont accrues au dit Eric Surprenant, colégataire universel de Marguerite Denaut.

LORANGER (T. J. J.), pour le Demandeur, prétendait que la disposition testamentaire, en faisant tomber le legs dans la communauté, avait fait une attribution de part à chacun des colégataires, et que cette attribution de part rendait l'accroissement impossible.

DOUTRE (J.), pour le Défendeur, répondait que la clause qui fait tomber les biens dans la communauté ne portait que sur

l'exécution du legs, et, pour établir que le cas donnait lieu au droit d'accroissement, il citait les autorités suivantes ; Domat, t. 1, liv. 3, tit. 1er, sect. 9, Nos. 1, 5, 11, 14, 15 ; Duplessis, t. 1, p. 379 ; Bourjon, t. 2, p. 340, 8, p. 341, 9 jusqu'à 12, Id., p. 342, 14 ; Toullier, t. 5, Nos 505, 677, 679, 689, 691 ; Pothier, t. 6., Don. Test., p. 409 et suiv., Règles 1, 5, 18 ; Merlin, *Rép.*, vo *accroissement*, 811, 3 ; Duranton, t. 9. Nos 495, 497, 546 ; Ricard, *Don.*, tit. 1, 15, 39, No 473, p. 541, Nos 481, 487., Id., p. 544, Nos 501, 503, 504, 507 ; Vazeille, *Successions*, t. 3, p. 167, No 3, *in fine* No 4 ; Proudhon, *Usufruit*, 1, 2, No 630, 636.

" Considérant que, par leurs testaments, Charles Surprenant et Marguerite Bazinet, son épouse, en date du quatre mars 1840, ont nommé et institué leur fils, Eric Surprenant, l'un des Défendeurs et Marguerite Denaut, son épouse, leurs légataires universels, par les clauses suivantes (le dit legs couché dans les termes suivants, dans le testament du dit feu Charles Surprenant.) " Donne et lègue le testateur à Eric Surprenant, un autre de ses enfants issus de son mariage, et à Marguerite Denaut, sa femme, pour appartenir à la communauté de biens, qui règne actuellement entre eux, et être considérés comme conquêts d'icelle, tous et chacun des autres biens, meubles et immeubles, propres, acquêts et conquêts immeubles, qui se trouveront être et appartenir à lui, dit Sr testateur, au jour de son décès, à quelque somme qu'ils puissent se monter, de quelque nature, qualité et dénomination qu'ils soient, en quelques lieux, pays ou coutumes qu'ils se trouvent dus, sis ou situés, sans exception ni restriction d'aucun, les faisant et instituant ses seuls héritiers et légataires aniversels du résidu de tous ses susdits biens; pour, par eux, leurs hoirs et ayants cause respectifs, jouir, faire et disposer de tout d'iceux, en pleine propriété, au moyen des présentes, à n'en commencer la jouissance et possesion qu'au décès arrivé de lui, testateur, leur père et beau-père," et dans les termes suivants, dans le testament de Marguerite Bazinet : " Quant au résidu de tous les autres biens meubles et immeubles, propres, acquêts et conquêts immeubles, qui se trouveront être et appartenir à elle, testatrice, au jour de son décès, à quelque somme qu'ils puissent se monter, de quelque nature, qualité et dénomination qu'ils soient, en quelques lieux, pays ou coutumes qu'ils se trouvent dus, sis et situés, sans exception ni restriction, elle, testatrice, donne et lègue ce même résidu à Eric Surprenant et à Marguerite Denaut, ses fils et bru, avec elle demeurant, et qu'elle fait et institue ses seuls héritiers et légataires universels du résidu de tous ses biens ; pour, par eux, leurs hoirs et ayants cause en jouir, faire et disposer, en tout et pleine propriété, au moyen des présentes, pour aussi être les biens compris dans le

présent legs universel, considérés comme conquêts de la communauté de biens qui règne actuellement entre eux légataires universels ; à ne commencer la jouissance du résidu des susdits biens qu'au décès arrivé de la présente testatrice." Vu que la terre désignée dans la déclaration en cette cause formait partie et était comprise dans le dit legs universel : " Considérant que le décès de Marguerite Denaut, épouse du Défendeur, Eric Surprenant, arrivé avant la mort des testateurs, Charles Surprenant et Marguerite Bazinet, n'a pas donné droit aux héritiers des dit Charles Surprenant et Marguerite Bazinet, de participer ou de prendre part dans les biens légués par les dits testateurs, en vertu de leurs testaments susmentionnés, au temps du décès des testateurs. " Considérant que, par le défaut d'appréhender le dit legs, par Marguerite Denaut, les biens légués ne sont pas restés dans les successions des testateurs, mais que, par tel défaut, Eric Surprenant est devenu l'unique légataire universel des testateurs, et, comme tel, est devenu propriétaire exclusif de tous les biens meubles et immeubles délaissés par Charles Surprenant et Marguerite Bazinet. Vu que le Défendeur, Eric Surprenant, a valablement plaidé en droit, et a établi les allégués essentiels de son exception péremptoire plaidée à cette action, maintient la défense en droit ainsi que la dite exception, et a débouté et déboute l'action du Demandeur." (4 *J.*, p. 128.)

LORANGER et FRÈRE, pour le Demandeur.

DOUTRE et DAOUST, pour les Défendeurs.

PROCEDURES.—FAITS ET ARTICLES.

SUPERIOR COURT, Montreal, 26th March, 1860.

Coram MONK, J.

CUMMINGS *vs.* DICKEY AND THE SCHOOL COMMISSIONERS OF DURHAM, Opposants, *and* W. WINCHESTER, Plaintiff *par reprise d'instance*, Contesting.

Held: That default to appear and answer to interrogations *sur faits et articles*, on the part of the Plaintiff, will be taken off and the rule and interrogatories set aside, where this rule was issued during the pendency of a former rule, in the same case.

The Plaintiff *par reprise*, contesting, submitted to the court a motion which prayed that the default to answer to the interrogatories *sur faits et articles*, which was recorded against the late Sarah Cummings, on the 5th day of April, 1853, be annulled and set aside, and the rule itself declared to be null. After

alleging, that a rule was previously issued and a consent filed, that the answers to the interrogatories of Cummings should be taken before a commissioner, and that the commissioner had returned, that she was, through extreme age, incompetent to answer the motion asked, the setting aside of the default, because the second rule was irregularly issued, another rule having been previously issued on the 14th day of February, 1853, in the case. The court, granted the motion on the ground of the irregularity of the issue of the second rule. (4 *J.*, p. 131.)

A. MORRIS, for Plaintiff.

A. and G. ROBERTSON, for Defendant.

CARRIER.

SUPERIOR COURT, Montreal, 28th February, 1858.

Coram BADGLEY, J.

ISABEL MACDOUGALL *vs.* TORRANCE.

Held: 1st. That in an action against a carrier, a passenger's own oath will be received, as to the contents of a trunk, which had been broken open.

2nd. That the captain of a ship is liable for a *lady's* jewellery, stolen out of one of her trunks during the voyage. (1)

Plaintiff alleged that she was a passenger by the ship " Harlequin," from Glasgow to Montreal, of which Defendant was captain ; that she delivered to the mate, on board said vessel, a trunk containing jewellery, of the value of £120, and informed him that it contained valuables ; that the trunk was broken open, during the voyage, and the jewellery abstracted. Plaintiff proffered her own oath, as to the value of the jewellery. Defendant pleaded want of notice of the contents of the trunk, and delivery to Plaintiff, and denied the allegations of Plaintiff, except that of her having been a passenger. The delivery of the trunk, in good condition, on board the vessel, and the loss of the ornaments, while on board, was established by several witnesses, and Plaintiff's own oath was taken as to the contents and value of the articles. Her estimation of them was corroborated by that of two jewellers, who were aware of her possession of the family jewellery, and of its value. The case was submitted without argument, and judgment was rendered for the amount of the claim. (4 *J.*, p. 132.)

TORRANCE and MORRIS, for Plaintiff.

ROSE and RITCHIE, for Defendant.

(1) V. art. 1677 C. C.

AUTHORITIES : As to ornaments, Angell, *on Carrier*, page 117, 118, 458, and as to the oath of Plaintiff, Idem, 450, 452, 456, 457 ; Danty, on *Preuve par témoins*, page 115, sec. 29. The master continues liable, under the *Shipping Act* of 1854 and 1855 ; Dowdeswell, *Shipping Acts*, page 221, 510 ; Vide *Shipping Act* of 1853, s. 51. Though the owner seems to be absolved, Idem, p. 215. 500, *Shipping Act* of 1854, s. 503. *Sed* see also 7 *R. J. R. Q.*, p. 147, case of *Cadwalladder* vs. *Grand Trunk Railroad Company* as to man's jewellery, where a different rule is adopted.

JURIDICTION.—CAPIAS.

COUR SUPÉRIEURE, Montréal, 31st May, 1861.

Coram MONK, J.

MACDOUGALL *vs.* TORRANCE.

Held : 1° That a debt arising out a contract made in Scotland, to deliver passenger's luggage in the port of Montreal, and where delivery failed to be made, is not a cause of civil action which has arisen in a foreign country. (Consolidated Statutes, L. C., Cap. 87, sec. 7, §§ 2.) (1)

2° That judgment having been rendered in the district of Montreal, on such breach of contract, in favour of the passenger, a *capias ad respondendum* will lie against the body of the Defendant in Lower Canada.

3° That the Plaintiff is justified in his belief of the Defendant being immediately about to leave the Province of Canada, with intent to defraud the Plaintiff from the fact of the Defendant, being a seafaring man resident without Canada and in Great Britain, and temporarily within the Province, in command of a seagoing vessel which is immediately about to leave, and from the Defendant having made and making no attempt to pay the Plaintiff's debts and from the Defendant having absented himself from the Province in 1860, immediately after the rendering of the judgment against him, although in each of the three years next preceeding, he had been in the Province in command of a ship. (2)

The cause out of which the present cause arose is reported *supra*, p. 136. The Defendant, a master mariner, resident in Glasgow, Scotland, having failed to pay the amount of the judgment of the Superior Court, at Montreal, rendered against him on the 29th February, 1860, and abstaining from entering the Province in 1860, but arriving in the Province in the month of May, 1861, in command of the ship "Toronto," Plaintiff then sued out a *capias ad respondendum*, under which Defendant was arrested and gave bail to the Sheriff. The grounds of Plaintiff's belief that Defendant was immediately about to leave the Province of Canada, with intent to defraud Plaintiff, and that such departure would deprive Plaintiff of her remedy against Defendant were stated as follows, in the affidavit of Alexander M. Forbes, the agent of Plaintiff. And deponent doth depose as follows, as regard the grounds of his

(1) V. art. 34 C. P. C.
(2) V. art. 798 C. P. C.

said belief: That since the rendering of said judgment, against Archibald Torrance, in favor of Isabella Macdougall, Torrance hath made no attempt to pay the same, that he is a seafaring man resident without the said Province of Canada, to wit, in the Kingdom of Great Britain and Ireland, and, temporarily in the district of Montreal, and in the port of the city of Montreal, as a master-mariner, in command of a seagoing vessel belonging of Great Britain, and temporarily in said port, and which vessel hath just arrived in the port of Montreal, from Great Britain, with a cargo, and bound to set sail for and return to Great Britain, within a very few days, and is immediately about to depart, in command of said vessel for Great Britain aforesaid; that said Torrance, notwithstanding said intended immediate departure, hath made no provision for the payment of said sum first above mentioned, and he may never return to the said Province; that said Torrance did not come into the Province of Canada after the rendering of said judgment, in any ship, during the year eighteen hundred and sixty, although he had come into said Province in command of a vessel from Great Britain aforesaid, in each of the three years immediately next preceeding, and deponent doth verily believe that said Torrance did not come into the Province the year eighteen hundred and sixty, in order to avoid the payment of said judgment. The Defendant moved to quash the *capias* in the following terms, inasmuch as it appears, upon the face of the affidavit and declaration in the cause made and fyled that the pretented cause of debt set up by Plaintiff arose in a foreign country, to wit in Scotland, and, inasmuch as the grounds set forth in the affidavit of the pretended belief, on the part of Plaintiff, that Defendant was about to leave the Province, with the fraudulent intent, are wholly insufficient, vague and contradictory; that the writ of *capias ad respondendum* be quashed unless cause to the contrary be shewn on the 23rd day of May instant. The court rejected the motion, holding that the cause of action had not arisen in a foreign country, and further that the grounds of Plaintiff's belief of Defendant's fraudulent intent were sufficient to maintain the *capias*. (1) Motion rejected. (5 *J.*, p. 148).

TORRANCE and MORRIS, for Plaintiff.

ROSE and RITCHIE, for Defendant.

(1) The following authorities were cited by the Plaintiff in resisting the motion: 1° That cause of action was not foreign; Story, *Conflict of Laws*, § 280, p. 233, § 299, p. 248-9; Pothier, *Change*, n° 155; Chitty, *Pleading*, 1, 103, 5. 2° That the "cause of action," in the Statute means the whole cause of action, *Warren* vs. *Kay* 5 *R. J. R. Q.*, p. 153; *Rousseau* vs. *Hughes*, 6 *R. J. R. Q.*, p. 203. 3° That the grounds of belief stated are sufficient: *Benjamin* vs. *Wilson*, 3 *R. J. R. Q.*, p. 34; *Wilson* vs. *Reid*, 4 *R. J. R. Q.*, p. 126; *Berry* vs. *Dixon*, 4 *R. J. R. Q.*, p. 166; *Quinn* vs. *Atcheson*, 4 *R. J. R. Q.*, p. 203; *Lefebvre dit Vermette* vs. *Tullock*, 4 *R. J. R. Q.*, p. 287; *Hasset* vs. *Mulcahey*, 4 *R. J. R. Q.*, p. 474.

JUDICIAL SALE.—FRAUD.

COURT OF QUEEN'S BENCH, IN APPEAL,
Montreal, 1st September, 1858.

Coram Sir L. H. LAFONTAINE, Bart., C. J., AYLWIN, J., DUVAL, J., CARON, J.

GÉDÉON OUIMET et al. (Plaintiffs in the court below), App., and J. B. SENÉCAL et al. (Defendants in the court below), Respondents.

Held: A direct action will lie to have a sale of moveables set aside for fraud; and this, though a judicial sale has been resorted to. (1)

LAFONTAINE, C. J., rendering judgment said: Les Demandeurs ont été déboutés de leur action sur une *défense au fond en droit.* Cette action était dirigée contre: 1° Jean-Baptiste Senécal, sellier; 2° Chrysologue Senécal et François Daniel, imprimeurs associés; 3° Isaac Bourguignon, imprimeur; 4° Charles Lapierre, huissier. Ci-suit un précis des allégués de la déclaration des Demandeurs: 1° en vertu d'un bref d'exécution, émané de la Cour de Circuit, à la requête du dit Isaac Bourguignon, contre les deux associés, Senécal et Daniel, le dit huissier Lapierre procéda, le 27 février dernier, à 4 heures de l'après-midi, à la " boutique et bureau d'affaires " des associés, à saisir et prendre en exécution, comme appartenant à ces derniers, divers meubles, entre autres " une presse à cylindre, de Hoe & Co., de New-York, et tous ses appareils ; " 2° le 9 mars suivant, à midi et demi, le dit huissier procéda à la vente des effets ainsi saisis, et vendit le tout au dit J.-Bte. Senécal ; 3° la presse et ses appareils sont encore dans l'endroit où ils ont été ainsi saisis et vendus, et J.-B. Senécal prétend en être maintenant le propriétaire en vertu de cette vente ; 4° la presse et ses appareils étaient, avant et à la date des saisie et vente, la propriété des Demandeurs et l'est encore ; les associés Senécal et Daniel n'en avaient la possession que comme locataires, les ayant pris à loyer des Demandeurs ; 5° la vente ainsi faite le 9 mars est nulle, étant faite *super non domino,* et étant, de plus, frauduleuse, ainsi qu'il appert par la simple inspection du procès-verbal de l'huissier, et encore parce que J.-Bte Senécal a fait faire la vente en secret, et sans en rien communiquer aux Demandeurs, bien qu'il connût tous leurs droits susdits ; 6° la vente a été faite contrairement à la loi, et sans avoir observé les formalités, et sans que les Demandeurs aient eu aucune connaissance qu'elle

(1) V. art. 599 C. P. C.

allait avoir lieu, ce qui a été cause qu'il n'y a pas eu réellement de compétition à cette vente; tout avait été arrangé d'avance par fraude par les Défendeurs et l'huissier (à l'exception du dit Bourguignon); J. B. Senécal avait acheté le tout pour presque la somme exacte due au saisissant, avec intérêt, frais et frais subséquents; tandis que les effets vendus, s'il y avait eu compétition libre et ouverte, l'eussent été pour £1000 et au delà, et les quatre premiers items l'eussent été pour £750, la presse à cylindre, seule, valant £650; la vente a, de plus, été faite à une heure inaccoutumée, savoir, à midi et demi, et lorsque les ouvriers de Senécal et Daniel étaient absents à leur dîner, lesquels ouvriers, ou quelques-uns d'eux auraient pu en avertir les Demandeurs; la vente a été faite d'une manière précipitée par l'huissier qui prêtait son aide aux associés Senécal et Daniel, de telle sorte que la vente a été finie dans une demi-heure, et avant que les ouvriers fussent de retour de leur dîner; aucun pavillon ne fut exposé à la porte de la maison; J.-Bte Senécal, l'acheteur, est le frère du dit Chrysologue Senécal, et savait que les Demandeurs étaient alors les créanciers, comme en effet ils l'étaient, des associés Senécal et Daniel, à un fort montant. savoir, £500, et savait aussi que la presse à cylindre appartenait aux Demandeurs, et que Senécal et Daniel n'en étaient que les locataires; et, cependant, il ne donna aucun avertissement aux Demandeurs; et, depuis la vente, il a loué tout ce qu'il a ainsi acheté aux dits Senécal et Daniel, à vil prix, et il est de plus sous l'obligation de leur en faire cession à demande, sur le remboursement de son prix d'achat. Enfin, il y a eu fraude et collusion entre les Défendeurs (à l'exception du dit Bourguignon), et c'est en conséquence de cette fraude et de cette collusion que les saisie et vente ont eu lieu, de manière que c'est sans droit et sans titre que J.-B. Senécal prétend maintenant être le propriétaire de la presse; 7° les Demandeurs concluent à être déclarés propriétaires de la presse, à la nullité de sa saisie, vente et adjudication, etc.

Les Défendeurs ont plaidé séparément, à l'exception des associés Senécal et Daniel, qui se sont joints dans leur défense. Chaque plaidoyer contient une défense en droit et une défense en fait. Il ne s'agit, pour le moment, que des défenses en droit. Il suffit de relater les raisons données à l'appui de celle du dit J.-B. Senécal; les voici: " 1° parce que les Demandeurs n'allèguent pas sous quelles conditions ils se réputent propriétaires de la presse à cylindre, avec les appareils en question, si c'est comme associés, comme propriétaires indivis ou autrement, et ne font voir aucun rapport légal entre eux pour se porter comme tels propriétaires, et porter la présente action; 2° parce qu'il n'existe pas, sous notre droit, de telle

action mais qu'une demande en nullité de décret en matière mobilière ; 3° parce la nullité d'une vente forcée d'objets mobiliers ne peut être l'objet d'une action directe comme la présente ; 4° parce que les Demandeurs alléguant eux-mêmes en leur déclaration que la vente mentionnée comme ayant eu lieu le neuf mars dernier de la " Presse à cylindre de Hoe & Co., de New-York, et tous ses appareils," est nulle, la présente action ne peut avoir aucun objet légal, et les Demandeurs n'avaient et n'ont aucun intérêt à la porter sous la forme actuelle ; 5° parce que la nullité absolue de la vente alléguée par les Demandeurs n'ayant pu avoir l'effet légal de les déposséder de leur titre de propriété, la présente action ne pouvait compéter en leurs personnes ; 6° parce que les Demandeurs n'alléguant pas une fraude concertée entre les Défendeurs, les Demandeurs ne pouvaient légalement porter leur action contre différentes personnes, contre lesquelles ils n'allèguent aucun lien commun d'action." Le jugement n'est pas motivé ; le juge s'est contenté de dire : " Maintient les défenses en droit plaidées par les Defendeurs respectivement, en conséquence, déboute l'action des Demandeurs." Il me semble que le jugement est erroné ; les défenses en droit n'auraient pas dû être maintenues, ni l'action déboutée *in limine*. Les allégués de la déclaration sont suffisants pour justifier l'action et les conclusions, s'ils sont établis en fait. Une vente faite en apparence sous forme de justice, mais réellement faite par fraude et collusion, comme les Demandeurs prétendent que celle-ci l'a été, n'est pas plus exempte d'être attaquée par un tiers, victime de cette fraude et de cette collusion, que toute autre vente frauduleuse. Il ne doit pas être permis de dépouiller ainsi un tiers de sa propriété. Celui-ci doit avoir un moyen de se faire rendre justice. "Ce n'est pas seulement par des actes, dit *Chardon*, n° 62," c'est aussi dans des instances et par des jugements concertés, que, parfois, la fraude parvient à se préparer les moyens de nuire à des tiers, quelle que soit la surveillance du ministère public et des juges, trop souvent ce scandale se renouvelle dans les tribunaux." (1) Ces actes judiciaires ainsi entachés de fraude, peuvent, dans certains cas, être attaqués par la tierce opposition. Dans d'autres, on peut employer la voie directe pour exercer cette action. Capmas, *De la Révocation des actes*, p. 100, n° 66 : " Il n'est donc pas douteux que l'action paulienne s'applique chez nous, même aux jugements qui dépouilleraient le débiteur, et qu'il aurait laissé rendre contre lui, en colludant avec ses adversaires." (P. 104, n° 73.) " L'action paulienne peut être intentée contre tous ceux qui ont traité avec le débiteur de mauvaise foi, qui ont coopéré avec lui, d'une

(1) Merlin, aux mots " Opposition (tierce) ", §. 2.

manière quelconque à l'acte argué de fraude, ou seulement qui ont profité de cet acte, qui y ont trouvé l'accasion d'un gain injuste." L'action paulienne étant donnée contre un jugement argué de fraude, il y a la même raison de la donner contre une vente par exécution, mise à effet par fraude et par collusion, de manière à dépouiller injustement un tiers de sa propriété."

The judgment in Appeal was recorded as follows : " La cour, 1° Considérant que les allégués de la déclaration des Demandeurs sont suffisants en loi pour justifier leur action, et leur en faire adjuger les conclusions, s'ils sont établis en fait, que, par conséquent, toutes les défenses au fond en droit plaidées respectivement par les Défendeurs sont mal fondées, et que, partant, dans le jugement dont est appel, qui maintient les défenses au fond en droit, et déboute les Demandeurs de leur action, il y a mal jugé ; infirme le jugement rendu le vingt-neuvième jour de mai dernier par la Cour Supérieure, siégeant à Montréal, et cette cour procédant à rendre le jugement que la Cour Supérieure aurait dû rendre, rejette toutes les défenses au fond en droit. (3 *J.*, p. 35.)

MACKAY and AUSTIN, for Appellants.

DOUTRE and DAOUST, for Respondents.

JUDICIAL SALE OF MOVEABLES.—ACTION REVOCATOIRE.

COURT OF QUEEN'S BENCH, IN APPEAL,
Montreal, 1st March, 1860.

Coram The Hon. Sir L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, J., DUVAL, J., MONDELET, J.

GÉDÉON OUIMET et al. *(Plaintiffs in the court below)*, Appellants, *and* JEAN-BTE. SENÉCAL et al. *(Defendants in the court below)*, Respondents.

Held : That a direct action will lie to have a sale of moveables set aside for fraud ; and this though a judicial sale has been resorted to. (1)

The Appellants in April, 1858, in the Superiour Court, Montreal, sued the Respondents in an action *révocatoire*, and by their conclusions prayed that a certain cylinder printing press should be adjudged their property, and that a sale of it under execution, at suit of Bourguignon against Senécal & Daniel, should be declared fraudulent, null and void, &c. That action was dismissed upon demurrer, but the judgment dismissing it

(1) V. art. 590 C. P. C.

was reversed by sentence of this court reported *supra*, p. 142. After that the parties went to *enquête* in the court below.

The Superior Court, on 30th September, 1859, rendered the following judgment : " The Court, considering that the Plaintiffs have established, by legal and sufficient evidence, that, at the time of the taking in execution, by Isaac Bourguignon, of the printing press referred to in Plaintiffs' declaration, and of the sale thereof, by Bourguignon, under and in virtue of said execution, that Plaintiffs were the legal owners and proprietors of said printing press ; and, further considering that Defendants have proved, by legal evidence, on the issues by them severally raised by their pleadings that the execution, at the suit of Bourguignon, against the goods and chattels of Senécal & Daniel, was issued in due course of law, and was, in the forms prescribed by law in such matters ; and, further, considering that Plaintiffs have failed to prove or establish, by reason of anything alleged or proved in said cause, that the execution and sale had thereon, was in any way null and void and inoperative ; and that, by reason of the fact that said printing press not being the property of Senécal & Daniel, at the time of the execution, and sold, although seized and sold in the possession of Senécal & Daniel, as proprietors thereof, the said execution and sale so made *en justice* are not thereby null and void and inoperative, and cannot, by law, annul the said execution and sale, and, thereby entitle Plaintiffs to the conclusion by them taken in their declaration ; and, further, considering that Plaintiffs have failed to prove that Bourguignon, Lapierre and Jean-Baptiste Senécal, in any way, were cognizant of the fact, that Senécal & Daniel, at the time of the execution and sale of said printing press, were not the owners and proprietors of said printing press, or that Defendants, Senécal & Daniel, were in possession thereof by any other title than that of proprietors ; and, further, considering that Plaintiffs have failed to prove, by legal evidence, that Defendants, Bourguignon, Lapierre and Jean-Baptiste Senécal, were in any way, participant in any act of fraud or fraudulent concert to procure the issuing of the execution, or in any way fraudulently and collusively agreed to effect the sale of the printing press, as belonging to Senécal & Daniel, with the knowledge that said printing press was, at the time, the property of Plaintiffs, or in any way to defraud Plaintiffs ; and, further, considering that, in all cases of *ventes en justice (ventes forcées)*, where the formalities of law have been complied with no fraud on the part of the Defendants in the suit on which the execution has been issued, can affect or invalidate the rights of *bonâ fide* purchasers ; and, further, considering that Plaintiffs have admitted by their declaration,

that Bourguignon was in no way participant in any fraud as set forth by Plaintiffs, to obtain the conclusions of their said action, and that the ordinary presumption of law applicable to sales or alienations of a purely voluntary character do not apply to cases of *ventes forcées*, in the absence of some evidence of complicity or concert to defraud the rights of third persons (of Plaintiffs in the present instance); the court doth dismiss the said action, as against Bourguignon, Lapierre and Jean-Baptiste Senécal."

MONDELET, J.: Il ne s'agit plus maintenant que de l'appréciation de la preuve, car la Cour d'Appel ayant décidé, contrairement à l'opinion de la Cour Supérieure, qu'il y a en loi, une action pour faire mettre de côté une vente de meubles, telle que celle dont il est question, faite en justice, il ne s'agit plus que de s'assurer si la preuve des Demandeurs est suffisante. Il est à propos de remarquer de suite, que la Cour Supérieure (Smith, J.), tout en déclarant les Demandeurs propriétaires de la presse à cylindre, ne statue pas sur la question de la nullité de la vente d'icelle, et ne condamne que deux des Défendeurs, savoir: Chrysologue Senécal et François Daniel, et déboute l'action quant aux trois autres. Les trois Défendeurs absous sont: Charles Lapierre, l'huissier exécutant, Isaac Bourguignon le Demandeur, et Jean Baptiste Senécal, l'adjudicataire. Il est inutile d'entrer dans tous les détails de cette cause, et se fatiguer à récapituler l'énorme masse de preuves inutiles, inadmissibles en loi, étrangères à la contestation et tout à fait injustifiables, que les parties se sont permis de produire et qu'on paraît, à ma grande surprise, avoir plus ou moins sanctionnées. Il est à regretter que de pareils procédés aient eu lieu, et il semble que ceux qui conduisent les procédures devraient énergiquement s'opposer à l'admission de preuves aussi palpablement inadmissibles. Quelques objections, à la vérité, ont été faites, mais on eût dû dans tous les cas faire reviser celles des décisions rendues ou réservées à l'enquête, qu'on regardait comme erronées. Le système pernicieux de réserver est en pleine opération dans cette cause; aussi avons-nous un monceau de dépositions, qu'un juge pénétrant et exercé eut de suite énergiquement réduit à un très petit volume. Il n'y a à juger que deux faits: 1° les Demandeurs ont-ils prouvé qu'ils étaient propriétaires de la presse à cylindre? 2° ont-ils établi légalement que la vente dont ils se plaignent a été faite par fraude, &c.? 1° J'ai mis trois jours à lire et examiner tout le dossier, et je ne trouve nulle part, la preuve légale de la propriété alléguée des Demandeurs. L'on a tenté par des dire et des ouï-dire, et des bruits, et de ce qu'on répétait, d'établir ce fait, mais l'on a failli, et l'on est à se demander, d'après les assertions de plusieurs des témoins mêmes des Demandeurs, si ces messieurs étaient pro-

priétaires d'aucune chose, ou si les et tous les souscripteurs de *la Patrie* l'étaient, ou si aucun, et combien d'entre les Demandeurs, étaient propriétaires, ou si ces messieurs, ou quelques-uns, et combien et lesquels d'entre eux, étaient un comité de régie politique, ou enfin, et en deux mots quels ils étaient, et qu'est-ce qu'ils étaient. Les Demandeurs ne se sont pas même donné la peine d'alléguer comment ils sont propriétaires ; en sorte que, eussent-ils fait quelque espèce de preuve (ce qui n'est pas le cas) la cour ne pourrait les déclarer tels. Il est vrai que les Défendeurs auraient dû se plaindre de l'insuffisance manifeste des allégués de la déclaration, mais la faute des uns, à cet égard, ne remédie pas à celle des autres. Il y a, a-t-on dit, chose jugée, par le jugement de la cour de première instance, quant à la question de la propriété de la presse à cylindre ; non ! y eût-il chose jugée, ça ne serait tout au plus qu'à l'égard des deux, qui ont été condamnés, et non pas quant aux trois, qui ont été absous et qui ont nié les allégués des Demandeurs, qui auraient dû, comme ils y étaient tenus, les prouver. (1) Au reste, ce jugement n'a qu'une autorité momentanée, et qui, en l'absence d'un appel interjeté, ne confère d'autre droit que celui de faire émaner l'exécution. L'autorité de la chose jugée est tout autre chose. Il faut que le jugement soit rendu par une cour en dernier ressort, ou que le terme de l'appel soit expiré, ou que l'appel ait été déclaré périmé. Ord. 1667, tit. 27, art. 5 ; Jousse, t. 2, p. 87 ; 10 Toullier, No 97, p. 150 et suiv. Cela étant, l'action devait nécessairement être déboutée. J'ajoute qu'elle eût dû être déboutée quant à tous les Défendeurs. Il est à peine nécessaire de remarquer que cette cour ne doit aucunement s'occuper de savoir si les Défendeurs, Senécal et Daniel, étaient et sont propriétaires de la presse à cylindre. Il ne s'agit pas de cela du tout. 2° Quant à la vente, les deux seules circonstances qui, s'il y en avait d'autres sérieuses de prouvées, pourraient faire naître quelques soupçons, seraient l'heure à laquelle elle a eu lieu et l'exiguïté du prix. Or, quant à l'heure, outre qu'il n'y a aucune loi qui exige qu'une vente par huissier ait lieu à telle ou telle heure, nous avons le témoignage d'un certain nombre d'huissiers anciens, qui établit qu'il se fait de ces ventes à la même heure et à d'autres heures. Quant à l'exiguïté du prix, le principe ne s'applique pas aux ventes forcées de meubles, attendu que cette exiguïté de prix ne peut *légalement* établir aucune présomption, vu qu'à ces ventes il arrive le plus souvent que tout est sacrifié ; n'a-t-on pas vu des biens de £100 vendus pour quelques piastres ? *Presumptio nascitur ex eo quod plerumque fit.* Ainsi, dans l'espèce, la présomption n'est pas en faveur des Demandeurs, mais

(1) 10 Toullier, No 195.

elle est en faveur de la vente. J'ajouterai que des faits et articles on ne peut rien induire, car les refus de répondre à certains interrogatoires, ne tirent point à conséquence, vu que ces interrogatoires sont posés de manière à ne rien établir, à moins qu'on ne réponde. Il est assez étrange que les Demandeurs persistent à vouloir faire condamner Bourguignon, eux qui dans leur déclaration allèguent, qu'il n'a aucunement participé à la fraude dont ils se plaignent. Le jugement, quant aux deux condamnés, est sans fondement évidemment. Dans tous les cas, l'appel est mal fondé, et le jugement de la cour de première instance est bien rendu, quant aux trois Défendeurs, Bourguignon, Lapierre et Jean-Baptiste Senécal.

SIR L. H. LAFONTAINE Bart., Juge-en-Chef : Il y avait cinq Défendeurs à cette action révocatoire : 1° J.-Bte Senécal, sellier ; 2° Chrysologue Senécal et Frs Daniel, imprimeurs associés ; 3° Isaac Bourguignon, imprimeur ; 4° Charles Lapierre, huissier. Il y a déjà eu appel, dans cette cause, d'un jugement qui avait maintenu une défense au fond en droit. Ce jugement a été infirmé par cette cour. Les parties ont été, en conséquence, obligées d'instruire leur cause ; ce qu'elles ont fait, en partie, au moyen d'une preuve testimoniale dont la moitié pouvait être retranchée comme étant tout à fait inutile, et l'autre moitié serait encore plus que suffisante pour permettre à aucun tribunal de juger en pleine connaissance des faits. Il est à espérer que l'exécution du nouveau règlement qui exige l'impression des témoignages, dans les causes portées en appel, aura l'effet de faire disparaître cette prolixité dans les dépositions, et toutes ces questions inutiles qui ne sont propres qu'à introduire la confusion là où la clarté seule devrait apparaître. Toute la contestation se réduit à deux questions principales : 1° Les Demandeurs ont-ils prouvé qu'ils étaient propriétaires de la chose qu'ils revendiquent ? 2° S'ils l'ont prouvé, ont-ils établi qu'il y ait eu fraude, dans la vente dont il s'agit, et que les Défendeurs en aient eu connaissance, ou y aient été plus ou moins participants ? Sur le premier point, le jugement dont est appel a décidé dans l'affirmative, et il ne pouvait pas en être autrement. Trois des Défendeurs n'avaient aucune prétention à la propriété de la presse à cylindre qui fait le sujet du procès, Bourguignon, Lapierre, et Jean-Bte Senécal. Le premier était le créancier saisissant, le deuxième était l'huissier saisissant, et le troisième a été l'adjudicataire à la vente. La question de propriété ne concernait donc que les Demandeurs et les deux autres Défendeurs, Chrysologue Senécal et François Daniel. Cette question, le juge de première instance l'a décidée en faveur des Demandeurs, et il a très bien décidé, en présence, non seulement de l'ensemble de toute la preuve, mais encore de l'acte du 14 septembre 1857, fait par Ramsay, pour lui et ses coproprié-

taires, par lequel acte Chrysologue Senécal et Daniel prennent à loyer la presse à cylindre des " propriétaires de *la Patrie* qui sont," y est-il expressément déclaré, " également propriétaires de la grande presse à cylindre, qui se trouve actuellement et est en usage dans les ateliers typographiques de Senécal & Daniel." Ce sont à présent ces locataires qui, après avoir reconnu que les locateurs étaient propriétaires, réclament la propriété de la chose par eux prise à loyer ! C'est un nouveau mode d'acquérir la propriété qu'il faudra ajouter aux traités sur la matière. Il y a plus ; le jugement condamne Chrysologue Senécal et François Daniel à remettre aux Demandeurs la presse à cylindre, ou à leur payer la somme de £500 courant, et cela après avoir déclaré expressément que les Demandeurs avaient prouvé qu'ils étaient propriétaires de cette presse, et que les deux derniers Défendeurs, Senécal & Daniel, n'en étaient que les locataires. Et les deux condamnés n'ont pas appelé de ce jugement ! Ce jugement a donc la force de la chose jugée. " *Il est considéré comme la vérité*, tant que cette présomption légale n'est pas détruite par les voies de droit." (Bioche, au mot *Jugement*, No 467.) La *vérité* est donc que les Demandeurs sont propriétaires de la presse à cylindre, et cette preuve est une preuve authentique, résultant d'un jugement que nous ne pouvons infirmer sous ce rapport. Cette preuve milite, non seulement contre Senécal & Daniel, mais même, et encore avec bien plus de force si c'est possible, contre les trois autres Défendeurs, qui n'ont eu et n'ont pu avoir aucun titre à la propriété de la presse, avant la vente dont il s'agit. La deuxième question est celle de savoir s'il y a eu fraude, ou si J.-Bte Senécal peut être considéré comme un adjudicataire de bonne foi, quand même il y aurait eu fraude de la part des saisis. J'admets que la vilité du prix, dans les ventes forcées d'effets mobiliers, n'est pas par elle-même un motif suffisant d'annuler la vente. Mais elle peut être un élément dans l'appréciation des faits ou des circonstances d'où l'on argue la fraude.

Quels sont les faits ? Les voici : les Demandeurs sont propriétaires d'une presse qui est constatée valoir plus de £500. Cette presse est par eux louée à Senécal & Daniel, qui s'en servent pour imprimer le journal *la Patrie*, dont les Demandeurs sont également propriétaires. Le rédacteur et le teneur de livres du journal sont employés par les Demandeurs, et ont leur bureau dans la même maison où est la presse, et au même étage ; la porte du bureau fait face à cette presse. Les Demandeurs y vont très souvent. Aucun d'eux n'a connaissance de la saisie qui est dite avoir été pratiquée le 27 de février, non plus que de la vente qui a eu lieu le 9 mars. Les meubles de Senécal & Daniel avaient été vendus judiciairement à leurs domiciles. Ils étaient notoirement insolvables. Un de leurs ap-

prentis, le Défendeur Bourguignon, obtient un jugement contre eux pour ses gages, et, le 27 février, il les fait saisir et exécuter dans leur imprimerie, pour la somme de £30 1 1 seulement. Et pour le paiement de cette modique somme, on permet à l'huissier, et celui-ci prend sur lui de saisir des presses et un matériel qui valent £1000 à £1200. Il y a une presse à cartes qui est constatée valoir £25 à £30 et deux presses à bras, valant chacune £50 à £60. Ces trois presses appartiennent aux saisis, ainsi que le reste du matériel de l'imprimerie, moins la presse à cylindre qui est la propriété des Demandeurs, et qui vaut plus de £500. S'il faut saisir et vendre cette presse à cylindre, ce sera sans doute le dernier meuble. Point du tout. Il est le troisième effet saisi et vendu ! et seulement pour la somme de £6 5s. ! A qui est-il adjugé ? à Jean-Baptiste Senécal, frère et beau-frère des saisis ! Tout le reste des effets saisis est adjugé au même individu et le tout ainsi vendu à ce fortuné sellier ne produit qu'une somme de £36 16s. de laquelle, déduisant £5 16s. 4d. pour les frais de saisie et vente, il reste une balance de £30 19s. 8d., ce qui excède le montant à prélever de 18s. 7d. courant. Voilà tout ce qui revient à ces deux infortunés saisis, d'effets qui valaient £1000 à £1200 au moins ! Cependant rien ne change de place, tout reste au même endroit, comme si de rien n'avait été. Seulement, le lendemain de la vente, un frère de Chrysologue Senécal, et beau-frère de Daniel, Eusèbe Senécal, qui leur prête, ou leur avait déjà prêté £150, entre en société avec eux. Et l'on continue pendant quelques jours d'imprimer *la Patrie* comme par le passé. Le propriétaire de la maison où est l'atelier passe un bail à Jean-Baptiste Senécal, le sellier, et celui-ci fait à son tour un bail à la nouvelle société pour un prix convenu, mais le paiement est encore à venir. Le jour de la saisie, tous les effets de l'atelier de Senécal & Daniel étaient déjà sous saisie à la poursuite d'un autre de leurs créanciers. Ils trouvent le moyen, ce jour-là, de le désintéresser pour le moment, en lui donnant un fort acompte, et ce créancier donne en conséquence ordre au shérif d'arrêter sa saisie-exécution. Mais ce créancier n'a pas, plus que les autres, connaissance de la saisie de Bourguignon. Le matin de la vente, les saisis offrent à Bourguignon un acompte de £15 qu'ils ont emprunté d'un autre beau-frère, le nommé Archambault ; et Bourguignon refusant de les accepter, Chrysologue Senécal remet ces £15 dans son gousset, et se prépare à subir le grand sacrifice de son atelier, qui doit avoir lieu quelques minutes après. Que n'a-t-il alors donné ces £15 à l'huissier, et ne lui a-t-il fait vendre que le reste des effets saisis, qui lui appartenaient à lui et à Daniel ? Mais la presse à cylindre, dans ce cas, n'aurait pas été vendue, et ce n'aurait pas été le résultat qu'on atten-

dait de cette saisie secrète. Qui a été établi gardien à la saisie? Eusèbe Senécal, frère et beau-frère des saisis, et leur associé dès le lendemain de la vente! A quelle heure a été fixée *la vente?* On prétend qu'elle a été fixée à midi et demi, heure inusitée en pareil cas, de l'aveu de tous les huissiers entendus comme témoins, excepté un seul. Encore, celui-ci ne se rappelle-t-il que d'une seule vente qu'il ait jamais fixée à une pareille heure. A midi et demi, tous les ouvriers de l'imprimerie et des imprimeries voisines étaient absents de leurs ateliers, étant alors allés prendre leur dîner, ce qu'ils font de midi à une heure. Quand les ouvriers de Senécal & Daniel furent de retour de leur dîner, la vente était terminée. J.-Bte Senécal, l'adjudicataire de tous les effets saisis et vendus, l'admet dans ses réponses aux interrogatoires sur faits et articles. La vente était donc terminée à une heure. Que l'on remarque que l'huissier Lapierre a avoué lui-même que c'était la première fois qu'il fixait une vente, à Montréal, à midi et demi. Son recors, Gilbert Tassé, dit qu'ils ont attendu environ un quart d'heure "pour voir si Chrysostome Senécal n'arriverait pas avec de l'argent pour régler l'affaire." La vente n'a donc commencé qu'à midi trois quarts, et comme à une heure, elle était déjà terminée, cette vente n'a donc pas pris un quart d'heure. Et durant ce court espace de temps, l'huissier a pu crier et adjuger des valeurs de plus de £1000! Sans même que la personne ou les personnes qui sont prouvées avoir été dans ce moment-là dans le bureau de la rédaction, en aient eu connaissance! M. Saint-Amant, l'avocat de Bourguignon, et qui se trouvait à la vente, a cru même reconnaître, à la voix, M. Ramsay, comme étant l'une des personnes qui étaient dans ce bureau. "J'ai certainement, dit-il, entendu parler, dans cet appartement-là, en montant l'escalier, ainsi que lorsque j'ai été rendu sur la plateforme entre les deux portes, c'est-à-dire celle où se faisait la vente et celle du bureau de rédaction et d'affaires du journal." Saint-Amant a donc eu raison de dire à Ricard, étudiant en droit, le même jour de la vente, que cette vente s'était faite "très promptement." Nous avons la preuve que la vente a été faite en moins d'un quart d'heure. Voyons si elle pouvait être honnêtement et de bonne foi faite dans ce court espace de temps. O'Neil, the bailiff, says that he never fixed a sale between 12 and 1 in the city of Montreal, cannot recollect to have heard of such a thing. In Saint-Vincent street, there would be no audience. "Fairly, or unfairly, if there was an audience, those things could not be sold in half an hour; they could not be entered and pointed out fairly to the audience in the time.... could not be honestly sold, as mentioned in detail in that *procès-verbal*, in half an hour." L'huissier Emilan McKay dit: "Je ne pourrais pas vendre et crier dans

une demi-heure les effets énumérés dans le procès-verbal." McKay avait son bureau au-dessous de l'imprimerie de Senécal & Daniel, de même que M. Betournay, avocat, chez qui Ricard était étudiant en droit. Aucun d'eux n'a eu connaissance de la vente et n'a vu de pavillon. "Lorsque je l'ai remarqué à M. Saint-Amant," dit McKay, "il n'a rien dit." Et Ricard ajoute qu'il n'a pas entendu monter ni descendre, et que M. Saint-Amant n'a rien dit du pavillon, au sujet de la remarque de M. Mackay." Cette affaire du pavillon paraît être un peu mystérieuse. Il est assez difficile de se fixer sur ce fait. Les uns l'ont vu ; selon les autres, il n'y en avait pas. Chrysologue Senécal lui-même a dit qu'il ignorait qu'un drapeau eût été exhibé. Si un drapeau a été réellement mis à la fenêtre, et à quelle heure, il faudrait s'en rapporter là-dessus à celui qui l'aurait ainsi placé ; c'est le recors de l'huissier, Gilbert Tassé, qui dit : "Quand Senécal est arrivé, et qu'il eût dit qu'il n'avait pas trouvé d'argent, je suis allé mettre le pavillon à la fenêtre du premier étage, au-dessus du rez-de-chaussée, à l'autre bout de l'enseigne de *la Patrie*, c'est-à-dire à midi trois quarts, ayant attendu un quart d'heure." Ce pavillon a dû être enlevé immédiatement après la vente. Il n'y était donc plus à une heure. Quelle foi faut-il donc ajouter à ces deux scieurs de bois qui disent avoir été occupés ce jour-là à scier dans la rue Saint-Vincent, avoir vu le pavillon à $1\frac{1}{4}$ h., lorsqu'ils sont partis pour aller manger au marché Bonsecours, et l'ont vu à la même place à $1\frac{3}{4}$ h. ? Le pavillon est destiné à avertir le public ou les passants qu'une vente doit avoir lieu. Pour que cet avertissement soit loyalement donné de la part de l'huissier, et puisse atteindre son objet, il faudrait, au moins, que le pavillon fût exposé pendant un temps raisonnable avant la vente. Assurément, l'huissier devait savoir qu'à une vente qui ne dure pas un quart d'heure, ce n'était pas remplir le but de l'avertissement, que de n'exposer le pavillon qu'au commencement de la vente. Il est à remarquer que le recors qui a exposé le pavillon est un témoin examiné de la part des Défendeurs. A part de Bourguignon, le saisissant, et de son avocat, il est prouvé qu'il n'y a eu à la vente que des Senécal, et des beaux-frères des Senécal, Chrysologue, Eusèbe, Jean-Bte et André Senécal, et Alex Archambault, leur beau-frère, puis François Daniel, aussi leur beau-frère ; puis, quatre imprimeurs seulement, les deux saisis, Eusèbe Senécal qui est entré en société avec eux le lendemain, et enfin Bourguignon qui paraît avoir formé, vers ce temps-là une société avec un autre imprimeur du nom de Cérat. Cependant Bourguignon n'a pas jugé à propos de parler de la saisie et de la vente, à son associé Cérat, qui, s'il l'eût su, n'aurait peut-être pas fait comme Bourguignon, refusé d'acheter pour quelques louis une presse qui en valait plus de cinq cents. "Je me suis abste-

nu de parler de la saisie que j'avais faite," dit Bourguignon, "excepté parmi ma famille et mes principaux amis." Cela fait tant de tort aux personnes qui ont le malheur d'être saisies! aussi pas un mot à son associé Cérat, qui est imprimeur. André Senécal, le frère, n'est arrivé qu'à la fin de la vente. Ce n'était pas la vue d'un drapeau qui l'y avait amené, car, il ne peut dire s'il en a vu un, ayant vu, seulement en entrant, quelque chose de rouge à la porte. Archambault, le beau-frère, a été à la vente, mais la presse à cylindre était déjà vendue, lorsqu'il est entré. " Quelqu'un des Senécal m'a demandé à aller à la vente," dit Archambault. Jean-Bte Senécal, l'adjudicataire, dit : " Je suis entré avant que la vente fût commencée, de sorte que je n'ai pu voir s'il y avait enseigne ou drapeau à la porte ou ailleurs." Ce n'était donc pas le drapeau qui l'avait averti de la vente. Cependant il savait qu'elle devait avoir lieu, et l'heure précise à laquelle elle avait été fixée. Il en a donc reçu avis d'ailleurs. De qui, si ce n'est, comme Archambault, de ses frères Senécal, ou beaux-frères. Il n'a pas payé à l'huissier les articles, à mesure qu'ils lui étaient adjugés. Non, il a attendu que la vente fût terminée, et a tout payé, non à l'huissier, mais à M. Saint-Amant, l'avocat de Bourguignon. C'était peut-être dans la vue que la vente se fît " très promptement," comme l'a dit Saint-Amant. Venons maintenant à la déposition de M. Boudrias, témoin des Défendeurs. Il est " professeur à l'Ecole normale." Il était sur le point de prendre maison, et désirait acheter des meubles aux encans. Il va voir les affiches à la porte de l'église. Celle qui annonçait la vente chez Senécal et Daniel attire son attention. La vente était fixée, dit-il, à 1 h. ou 2 h. " Je suis plutôt sous l'impression que c'était deux heures. Si l'heure avait été mentionnée comme fixée à midi et demi, j'aurais assisté à la vente, mais pour très peu de temps, environ un quart d'heure ou vingt minutes." Il lui fallait être à l'Ecole normale à 1 heure. Il est aussi prouvé que l'huissier Lapierre est dans l'habitude de sonner une cloche pour annoncer les ventes qu'il est chargé de faire. Il n'en a pas sonné dans cette occasion. Un témoin ou deux *croient* avoir vu un M. Cadotte, sellier, à la vente. D'autres témoins disent qu'ils ne l'ont pas vu. Plusieurs des Défendeurs ont montré une insigne mauvaise foi, en refusant péremptoirement de répondre à plusieurs des interrogatoires sur faits et articles. Aussi ces interrogatoires doivent-ils être tenus pour confessés et avérés, au moins ceux qui peuvent l'être ; car il y en a quelques-uns qui, à raison de leur rédaction défectueuse, ne sauraient l'être. Je dois dire que je vois dans cette saisie et cette vente, une affaire qui a été conduite secrètement autant que possible, une affaire conduite en famille, par collusion entre les membres de cette famille, caractérisée par la fraude

la plus patente, fraude à laquelle ont participé toutes les personnes concernées, non seulement les deux Défendeurs condamnés, mais encore les trois autres Défendeurs absents, même Bourguignon, bien que par la déclaration des Demandeurs, aucune telle participation ne lui soit imputée, qu'il en soit même disculpé. Enfin, toute la transaction a été exactement décrite par Chrysologue Senécal lui-même, dans une conversation qu'il a eue, après la vente, avec le témoin J.-Bte Deslauriers, étudiant en droit. "J'ai," dit ce témoin, "entendu dire, par Chrysologue Senécal, depuis la vente, que lui, Senécal & Daniel, son associé, avaient été plus fins que les Demandeurs." C'est sans doute, bien vrai, mais ce ne sont pas de ces finesses qui doivent recevoir la sanction d'une cour de justice.

The judgment in appeal was as follows: "La cour, 1° considérant que les Demandeurs ont établi que, lors de la saisie et de la vente dont il s'agit, ils étaient propriétaires et avaient la possession de la presse à cylindre qu'ils revendiquent; 2° considérant que la saisie de la presse, sur les Défendeurs dans la cause dont il s'agit, a eu lieu et a été pratiquée secrètement, de mauvaise foi, par collusion et fraude concertée entre tous les Défendeurs, même Bourguignon, bien que la déclaration des Demandeurs n'ait attribué à ce dernier aucune participation à la collusion et à la fraude, que, néanmoins, Bourguignon, nonobstant cette disculpation alléguée dans la déclaration des Demandeurs, a été régulièrement mis en cause, pour voir la saisie et la vente qui s'en est ensuivie déclarées nulles, que, par conséquent, il doit être, avec les autres Défendeurs, condamnés aux dépens de l'action, puisqu'il a jugé à propos, mais sans motif valable, de contester cette action; 3° considérant que, non seulement la saisie de la presse à cylindre, mais encore que la vente de cette presse ont eu lieu et ont été pratiquées secrètement, de mauvaise foi, par collusion et par fraude concertée entre les saisis, l'huissier saisissant et Jean-Baptiste Senécal (l'adjudicataire de la presse, au prix de six louis cinq schellings, tandis qu'il est clairement prouvé que la presse valait plus de cinq cents louis); qu'à la vente et adjudication de la presse à cylindre, ces quatre individus ont agi secrètement, de mauvaise foi, et se sont rendus coupables de la collusion et de la fraude, qui leurs sont imputées, d'après la preuve faite dans la cause; 4° considérant qu'en pareil cas la saisie et la vente de la chose qui en a fait l'objet sont nulles et doivent être déclarées telles par le tribunal appelé à prononcer; 5° considérant que, par le jugement de la cour de première instance, il y a bien jugé, en autant que les Demandeurs-Appelants, sont déclarés être propriétaires de la presse à cylindre, et que les Defendeurs Chrysologue Senécal et François Daniel sont condamnés à leur remettre la presse, ou à leur payer la somme

de cinq cents louis, avec intérêts et dépens, mais qu'il y a mal jugé, en autant que les Demandeurs sont déboutés de leur action quant aux trois autres Défendeurs, et que, de plus, la saisie et la vente de la presse sont déclarées valables, maintient le jugement et la condamnation qu'il porte contre Chrysologue Senécal et François Daniel, pour être la dite condamnation suivie et exécutée selon sa forme et teneur, et cette cour, faisant droit sur les autres conclusions des Demandeurs, et procédant à rendre le jugement que la Cour Supérieure aurait dû rendre, annule la saisie, vente et adjudication de la presse à cylindre, déclare les Demandeurs propriétaires de la presse, à l'encontre de tous les Défendeurs, condamne Jean-Baptiste Senécal, l'adjudicataire d'icelle, à la rendre et restituer aux Demandeurs, sous quinze jours de la signification du présent jugement, et, à défaut de *ce* faire, dans le dit délai, la cour le condamne, conjointement et solidairement, avec Chrysologue Senécal et François Daniel, à payer aux Demandeurs la susdite somme de cinq cents livres. (*L'honorable juge C. Mondelet dissentiente.*) (4 *J.*, p. 133.)

MacKay and Austin, for Appellants.

Doutre and Daoust, for Respondents.

PRESCRIPTION OF HOUSE RENT.—INTERRUPTION.

Circuit Court, Montreal, 10th March, 1860.

Coram Badgley, J.

Alexander M. Delisle *vs.* John McGinnis.

Held : 1. That the prescription of five years established by the 142nd article of the *ordonnance* of 1629 against arrears of house rent is in force in Lower Canada. *Semble :* That it is an absolute bar to the action. (1)

Held : 2. That Defendant having said within the five years immediately preceding the action, upon being asked for payment *that he believed he had a larger account against Plaintiff*, was sufficient to interrupt prescription. (2)

This was an action to recover a balance of house rent, accrued more than five years previous to the institution of the action. Defendant pleaded the five years prescription, under the 142nd article of the *ordonnance* of 1629, without tendering his oath; Plaintiff answered that Defendant could not, by law, claim such prescription, and, besides, that Defendant had, within the five years immediately preceding the institution of the action, on different occasions, aknowledged his indebtedness to Plaintiff.

(1) V. art. 2250 C. C.

(2) V. art. 2227 C. C.

PER CURIAM: The plea of prescription must be maintained. It is now for Plaintiff to prove the interruption, if he can. Defendant, in his answer to Plaintiff's interrogatories, then, admitted that, about six or eight months ago, he was asked for payment of the amount claimed, by T. S. Judah, acting as the attorney of Plaintiff, and that he had replied as follows: "I have a larger account against Mr. Delisle."

DOHERTY, for Defendant, contended that this being a qualified statement, and no acknowledgment of indebtedness was not sufficient to operate interruption.

PER CURIAM: If the court were to decide that these words were in sufficient to work interruption, it would amount to this, that Defendant, at the time, had a right to constitute himself *arbiter in rem suam*, by pretending that, although he was the debtor of Plaintiff for a certain amount, Plaintiff was his debtor to a larger sum, which he could not do. It is to be observed that prescription is based upon the presumption of payment, but, in this case, Defendant admits Plaintiff's credit as against him, and pretends that his obligation is extinguished by a compensation of another claim which he has yet to make good. The court, therefore, considers Plaintiff's case established. Defendant having referred the decision of the two items of his account disputed to Plaintiff's oath, and Plaintiff being absent from the city, the courts appoint the first day of next term for Plaintiff to make such oath. As to the rest of Plaintiff's demand, upon verification of the receipts produced by him, his plea of payment will be sustained. (4 *J.*, p. 145.)

W. A. BOVEY, for Plaintiff.

M. DOHERTY, for Defendant.

SECURITY FOR COSTS.

CIRCUIT COURT, Montreal, 17th February, 1860.

Coram SMITH, J.

MOYER et al. *vs.* SCOTT, AND BENNING et al., Garnishees.

Held: That a foreign Plaintiff will be held to give security for costs on the application of garnishee whose declaration is contested by Plaintiff. (1)

PER CURIAM: Plaintiffs, foreigners, have contested the declaration of the Garnishees, who, thereupon, have asked for security for costs from Plaintiffs. The Garnishees are entitled to this, and their motion to that effect is granted. (4 *J.*, p. 146.)

M. MORISON, for Plaintiffs.

LAFLAMME, LAFLAMME and DALY, for Garnishees.

(1) V. art. 29 C. C.

MINEUR.

COUR DE CIRCUIT, Montréal, 17 mars 1860.

Coram MONK, J. A.

THIBAUDEAU *vs.* MAGNAN.

Jugé: Qu'un mineur peut être poursuivi, en son propre nom, pour des objets de nécessité pour le paiement desquels il est responsable, et qu'il n'est pas nécessaire que l'action, dans ce cas, soit dirigée contre le tuteur du mineur. (1)

L'action du Demandeur avait pour objet le recouvrement du prix de chaussures vendues au Défendeur. La preuve établissait clairement la vente, et que l'achat fait par le Défendeur était proportionné à son état et à ses revenus. Le seul point sur lequel le Défendeur appuyait sa défense était sa minorité, et que, n'ayant pas encore atteint l'âge de vingt et un ans, il ne pouvait pas être assigné légalement à répondre, en son propre nom, à l'action du Demandeur, mais que la demande de ce dernier aurait dû être dirigée contre le tuteur. La cour, par son jugement, a reconnu la validité de la procédure du Demandeur, en maintenant l'action de ce dernier. (2) (4 *J.*, p. 146.)

DENIS, pour le Demandeur.

BONDY et FAUTEUX, pour le Défendeur.

PROCEDURE.—EXHIBITS.

SUPERIOR COURT, Montreal, 18th March, 1860.

Coram SMITH, J.

DENIS *vs.* CRAWFORD.

Held: That 76th section of the Judicature Act of 1857 has virtually repealed the 24th rule of practice of the Superior Court, requiring the filing of exhibits, on which a declaration or other pleading is founded, at the time such declaration or other pleading is fyled. (1)

This was a motion by Defendant to reject from the record certain exhibits on which Plaintiff's declaration was founded, and which were only filed with Plaintiff's statement or articulation of facts, instead of being filed at the same time as the declaration, as required by the 24th rule of practice. The rule invoked by Defendant enacts that such exhibits shall not be filed " afterwards, unless by the special permission of the court." Not being filed within the prescribed period, De-

(1) V. art. 304 C. C.

(2) *Sed vide contra* Pigeau, t. 1, p. 83 ; 5 *R. J. R. Q.*, p. 170.

(3) V. art. 99, 100 et 106 C. P. C.

fendant filed a written foreclosure against the filing of such exhibits afterwards.

Per Curiam: I and my colleague consider that the 76th section of the Judicature Act has virtually repealed the rule of practice relied on, and that the only penalty for not filing the exhibits at the time required by the rule is the payment of such costs as may thereby be occasioned to the opposite party. The motion is consequently rejected. (4 *J.*, p. 147.)

Ouimet and Morin, for Plaintiff.

Bethune and Dunkin, for Defendant.

CAUTIONNEMENT POUR FRAIS.

Superior Court, Montreal, 17th September, 1859.

Coram Badgley, J.

Bonacina *vs.* Bonacina, *and* Divers Opposants.

Held: That it is competent for an Opposant, *before* filing a contestation of the claim of another Opposant, described as residing beyond the limits of the Province, to call upon such other Opposant to put in security of costs. (1)

This was a motion for security for costs, made by an Opposant who declared that he intended to contest the claim of another Opposant described as resident beyond the limits of the Province, and whom he now called on to give such security. On argument the motion was granted. (4 *J.*, p. 148.)

Dorion, Dorion and Senécal, for Opposant moving.

H. Taylor, for Opposant resisting.

CAUTIONNEMENT POUR FRAIS.

Superior Court, Montreal, 21st September, 1859.

Coram Badgley, J.

Bonacina *vs.* Bonacina *and* Divers Opposants.

Held: That it is not competent for an Opposant, *after* filing a contestation of the claim of another Opposant, described as residing beyond the limits of the Province, to call upon such other Opposant to put in security for costs. (2)

This was a motion for security for costs, made by an Opposant who contested the claim of another Opposant described as residing beyond the limits of the Province, and calling on

(1) V. art. 29 C. C.

(2) V. art. 29 C. C.

such other Opposant to put in such security. On argument the motion was rejectecd. (4 *J.*, p. 148.)

DRUMMOND and DUNLOP, for Opposant moving.

H. TAYLOR, for Opposant resisting.

MARRIAGE IN EXTREMIS.

PRIVY COUNCIL, 28th and 29th June, 1867.

Present: Sir JOHN TAYLOR COLERIDGE, Sir JAMES WILLIAM COLVILLE, Sir EDWARD VAUGHAN WILLIAMS, Sir FITZ-ROY KELLY (the Lord Chief Baron), and Sir RICHARD TORIN KINDERSLEY.

ANN SCOTT, Appellant, *and* MARIE-MARGUERITE-MAURICE PAQUET and others, Respondents.

Act 6 *of the Ordonnance of Louis XIII* (26th *November*, 1639), in force in *Lower Canada*, is in these terms :—" *Voulons que la même peine (de la privation des successions) ait lieu contre les enfants qui sont nés des femmes que les pères ont entretenues, et qu'ils épousent lorsqu'ils sont à l'extrémité de la vie.*"

Held: 1° That as the above article of the *Ordonnance* was a restraint of natural liberty, and penal in its nature, it was to be strictly interpreted, and only when the fact of a party being *in extremis* at the time of the solenmization of the marriage was clear and beyond doubt could it be applied. 2° That although death had taken place two days after a marriage had been celebrated, such article of the *Ordonnance* did not affect the validity of the marriage, unless the party was at the time sensible that he was in his last illness, and in immediate danger of dying.

Suit for nullity of marriage, and to set aside a marriage contract, on the ground that, at the time of its celebration, the husband was delirious and of unsound mind, arising from an attack of *delirium tremens*, from which disorder he died two days afterwards. The evidence in chief of one of his medical attendants being to the effect that he was unconscious and, in his opinion, from the nature of the disease, incapable at any time of contracting such marriage: *Held*, on general review of the evidence, to be rebutted, especially by the conduct of the same medical witness in speaking of the probability of the deceased's recovery, and by the evidence of the priest, notary, and witnesses at the marriage, of his capacity; and the judgments of the courts in *Lower Canada* sustained.

This was an action brought by the Appellant in the Superior Court for *Lower Canada*, district of *Montreal*, against the Respondents, *Paquet* and others, widow and children of *William Henry* Scott, late of the village of *Saint Eustache*, in the county of *Two Mountains*, *Lower Canada*, merchants deceased, to have the marriage of Scott with the Respondent, *Paquet*, declared null and void as regarded its civil effects, and also to set aside the marriage contract executed on the occasion thereof. The Appellant claimed as his sister and heiress-at-law.

The facts were these: Scott, a member of the Presbyterian Church, had for many years cohabited with the Respondent, *Madame Paquet*, a roman catholic, by whom he had a family of five children, whom he recognized and treated as his own children. In 1845 a marriage was contemplated and intended between Scott and *Madame Paquet*, which was to be celebrated according to the rites of the Roman Catholic Church, and all necessary preparations were made for that purpose, but the completion was prevented by *Scott's* refusal to give a preliminary engagement, required by the priest before celebration, that he would cause his children to be educated in the roman catholic religion. On the 15th of December, 1851, *Scott* went to the house of *Madame Paquet* who resided in the village of St. Eustache, just opposite to his own, and there sent for a roman catholic priest, for the purpose of proceeding to a marriage, and finding that no other engagement was now demanded of him than that he would leave his wife and children free in point of religion, he caused a marriage to be celebrated between himself and *Madame Paquet* on the evening of the following day, the 16th, according to the rites of the Roman Catholic Church. By the act of marriage the consorts acknowledged, as legitimate, their five children. The marriage was accompanied by a contract or settlement prepared by a notary. *Scott* was of intemperate habits, and had indulged in drinking during the course of a contested election which took place three days previous of his marriage. He was unwell at the time, and his physician, Dr. *Jamieson*, was with him during the greater part of the day of his marriage. His illness increased and according to the medical testimony, although the nature of his desorder had not been originally understood, yet it ultimately declared itself to be *delirium tremens*. As late as the 17th of *December*, Dr. *Jamieson* considered that the disease, though of an aggravated character, would give way to the treatment which he and Dr. *Fisher* another physician, recommanded. But the prescribed treatment was not followed, and *Scott* sank and expired on the 18th of that month. From the death of *Scott* to the period of the institution of the action, his children publicly enjoyed the character of being his legitimate heirs and were judicially admitted to accept his succession with benefit of inventory. The Respondent, *Paquet*, had also since Scott's death, been in possession of the immoveable property which he by the marriage contract settled on her in case of her surviving him, and which contract was, in April 1852, duly registered. On the 4th of March, 1854, the Appellant brought an action against the Respondent, *Paquet*, and the five children of *Scott*, in the Superior Court for *Lower Canada*, in the district of *Montreal*. The declaration

stated that *Scott* had died intestate, having three sisters, his only surviving relations and heirs-at-law, two of whom had renounced his estate, the Appellant accepting it as sole heiress-at-law; that in *December*, 1851, he fell ill of the malady that caused his death; that his disease became so aggravated that, on the 15th of *December* he was delirious, and so continued up to his death; and that, while in that state, he was quite incapable of entering into any contract or granting any valid consent; that he had lived many years in a state of concubinage with the Respondent, *Paquet*, without marying her or acknowledging her as his wife; that, while in a state of *delirium*, and incapable of consent, she, profiting by his condition, on the 16th of *December*, 1851, procured a pretended marriage to be solemnized between her and *Scott* and, on the same day procured a pretended marriage contract to be executed, that by the register of the marriage it endeavoured to rocognize as legitimate the children of the illicite connection, and the provisions of the contract; that *Scott* was at the time of the marriage in a state of *delirium*, and *in extremis*, and afflicted with the malady whereof he died; and the pretended marriage was clandestine, celebrated without the knowledge or consent of *Scott's* relations, and was neither publicly solemnized nor accompanied by the necessary formalities, nor followed by consent on his part; and that the Respondent, *Paquet*, and the other Respondent had assumed to be heirs of *Scott*, and had taken his estate into their possession; and the declaration prayed that the pretended marriage might be declared null and void. The Respondent filed their pleas, consisting of two sets of exceptions *péremptoire* and a *défense en fait*. The first set of exceptions referred to the capacity of the Appellant to maintain her action and was in substance to the following effect: that the Appellant, being only a collateral relation, could not maintain such an action; that ever since the death of *Scott* the Respondent has assumed the character of his representatives, and that their right to that character had been publicly recognized, and had been acquiesced in by the Appellant; that the Appellant had recognized their right to such character by transferring to *Barbara* and *Jane Scott* her rights as one of he legatees of *Scott's* father, in a sum of money due on a judgment obtained by *Scott's* father, on the 24th of *April*, 1824, against *Scott* and another; and that the Appellant could not maintain her action without joining her sisters as co-Plaintiffs. The second set of exceptions referred to the merits and was to the following effect: that for many years *Scott* and the Respondent, *Paquet*, lived together as husband and wife, under promises frequently reiterated by *Scott* that he would marry her;

that the Appellant and her sisters were aware of this, and recognized the position of the Respondent, *Paquet*, and her children; that about twelve years previously *Scott* had intended to fulfil his promise of marriage, and had assembled his friends and the priest for the purpose, but was prevented from so doing by understanding that the priest required him to make oath that he would allow his children to be brought up as roman catholics; that it was with the view of carrying this intention into effect that he contracted the marriage complained of; that such marriage was contracted legitimately and lawfully on the presence of a roman catholic priest duly authorized to celebrate such marriage, and that Scott was at the time sound in mind. The *défense en fait* put in issue all the statements contained in the Appellant's declaration. Witnesses were examined on behalf of the Appellant and Respondent. The Appellant objected to the reception of the evidence of the Respondent's witnesses, so far as it went to prove that a marriage had been celebrated, on the ground that verbal evidence of a marriage was inadmissible by law, and such objections were reserved, but the evidence was afterwards admitted. The evidence as to the capacity of *Scott* was conflicting. On the part of the Appellant, Scott's medical attendants, Dr. *Jamieson* and Dr. *Fisher*, declared, as their opinion, that in the case of a person suffering from *delirium tremens* there could be no lucid interval during which he could have the use of his faculties or be fit to contract any kind of business; that Scott was in a state of *delirium tremens* just before and immediately after the alleged ceremony, and that it was a scientifie fact that this disease never leaves the patient until it leaves him finally; that there may be times at which it is more intense than at others, but that the patient is never perfectly sane. The evidence for the Respondents consisted of the depositions of the notary, priest and others, who were present at the marriage ceremony, and they deposed to the perfect sanity of *Scott* at that time. It was proved that Dr. Jamieson had said, when attending the diseased that he considered that the decease would give way to the treatment he and Dr. *Fisher* recommended. No medical evidence was produced by the Respondents in answer to the evidence given by Drs. *Jamieson* and *Fisher*. The cause came on to be heard, and by the judgment of the Superior Court, delivered on the 30th of *May*, 1856, the action was dismissed with costs, on the ground that the Appellant had failed to establish the material allegations of her declration.

The judgment was rendered by the Superior Court (Day, Smith and Mondelet, judges): "The court, considering that Plaintiff hath failed to establish, by evidence, the material allegations of her declaration, and, more especially, that the

late William Henry Scott, therein mentioned, was, at the time of contracting marriage with Defendant Marie-Marguerite-Maurice Paquet, on the 16th day of December, 1851, delirious, or otherwise of unsound mind or understanding, or that said marriage was so contracted by him, said William Henry Scott, in the immediate prospect, or at the period of death, *à l'extrémité de la vie;* and that, by reason of such failure of evidence ; said marriage ought not by law to be declared null and void, or to be in any manner or respect, or as to any of its effects, annulled or made inoperative, doth dismiss the action of Plaintiff."

The Appellant appealed from this judgment to the Court of Queen's Bench for *Lower Canada*. The appeal was heard before the justices Aylwin, Duval, Caron and Meredith, and on 5th of *October*, 1857, the court delivered judgment, dismissing the appeal with costs. Mr. Justice *Duval* and Mr. Justice *Caron* considered that all the questions raised by the pleadings ought to be decided in favour of the Respondents, and Mr. Justice *Meredith* agreed with them so far as related to the questions put in issue by the declaration. Mr. Justice *Aylwin* dissented from the rest of the court, and considered that all the questions raised on the pleadings ought to have been decided in favour of the Appellant.

The following remarks were made by the judges in the Court of Queen's Bench :

CARON, J. : This action was instituted by Ann Scott, one of the sisters, calling herself the heiress of William Henry Scott, her brother against Marie-M.-M. Paquet, and the other Respondents, his children, with the view of annulling the marriage, which William Henry Scott had contracted with Dame Paquet, and also for the purpose of annulling the contract of marriage, entered into between them, the same day, the 16th December, 1851, only two days before the death of Scott.

ALLEGATIONS OF THE DECLARATION.

The 18th December, 1851, death of Scott intestate, leaving, as his heirs, Appellant, Ann Scott, and also Barbara and Jane Scott ; these two last having renounced the succession of their brother, it went, in its entirety, to Appellant. On the 15th December, 1851, Scott was attacked by the illness of which he died, and, from that moment, he continued in a constant state of *delirium*, until his death, on the 18th. On the 15th December, 1851, a marriage was secretly solemnized, by Mr. Ancey (priest), with a contract of marriage, passed before Archambault, notary. At the time of the marriage, Scott was in agony, and incapable of knowing what he was doing. The

prayer of the declaration was, that the marriage should be declared null, as to its civil effects, as also the contract preceeding it. This nullity, it will be perceived, rests upon three reasons: 1° that the marriage was clandestine; 2° that it was solemnized *in extremis;* 3° that it was contracted when Scott was not *compos mentis.*

PLEAS.

I. The general issue; II. several exceptions, which may be summed up as follows: 1° that Plaintiff, being only a relative of the deceased in the collateral line, was not entitled to demand the nullity of the marriage; 2° that, from the death of their father, the young Scotts had been in possession of their *status*, as his children, acknowledged, publicly and notoriously, as his heirs and representatives, and that Defendant, their mother, had been put into, and was in peaceable possession, ever since his death, of the property, which had been settled upon her, by the marriage contract in question; 3° that Appellant herself had acknowledged the young Scotts, Respondents, as heirs of their father, by various deeds and documents of which several are given in the exceptions, and also by means of an action brought against them on these very deeds; 4° that the other sisters of Appellant should have been joined with her in the present action, which could not belegally brought by Appellant alone; 5° that Scott and Marie-M.-M. Paquet lived together, for a long time, as husband and wife, with the intention, and under the promise of marrying each other, and that, publicly and notoriously, and above all, to the knowledge of Appellant, who regarded the children, born of said union, as her nephews and nieces, and treated them as such; 6° that, it was in order to put into execution these resolutions and promises, that, on the 16th December, 1851, the marriage in question was celebrated, with legal and sufficient formalities; 7° that the present action is vexatious and fraudulent, instituted through a conspiracy between the Misses Scott, in order to ruin Defendant Paquet and her children.

The *Défense au fond en fait* made it incumbent on Plaintiff to prove the essential allegations of her declaration, on which she specially based her action, namely, the *clandestinity* of the marriage, the incapacity of Scott to make a contract by reason of insanity, and the apprehension under which he had been of an approaching death. Without proving these facts, or, at least, one of them, Plaintiff could not hope to succeed in her demand. The court below has based its judgment solely upon this defect or want of proof. It has not thought proper to enter into a consideration of the exceptions.

It has decided that Plaintiff had not proved her allegations, giving as reasons of its judgment, that Plaintiff had not established "that, at the time of his marriage, Scott was in the "*delirium*, the madness and mental incapacity alleged in the "action, nor that, at the time of the said marriage, he was "under the impression that he was on the point of dying, at "the last extremity." Such being the reasons of the judgment appealed from, in order to see if it be correct, it is necessary, first, to examine the evidence in the cause, and then, if this proof leaves some doubt, it will be necessary to direct our attention to the different questions of law raised by the exceptions. The important fact, about which, according to the proof, there exist difficulties in the cause, are the state of mind of Scott, at the time of the marriage, and the opinion that he himself entertained, at this time, as to the state of his health, and the probability of an approaching death. On the part of Respondents, it is contended that the evidence establishes that, at the time of the marriage, Scott had the full enjoyment of his intellectual faculties, and that he had no reason to think, and that those, who surrounded him, did not think any more than he did, that he must die of the sickness from which he was suffering; whilst, on the part of Appellant, it is contended that there is abundant proofs that Scott had then completely lost the use of his reason, and that it had not returned to him up to the moment of his death. It was incumbent on Appellant, who alleged these facts, to prove them; upon her was the *onus probandi;* if she has not made this proof, she ought to fail. In referring to the evidence taken on one side, and the other, it is impossible not to observe in it, great contradiction, difficult to account for, with respect to the mental condition of Scott, during the three days which preceded his death, the 15th, 16th and 17th December, 1851 (the 18th being the day of his death). The chief witness heard on the part of Appellant, on this point, is Dr. Jamieson, who attended Scott in his last illness; if we believe him, during three days, till the instant of his death, Scott was continually in a complete and uninterrupted state of mental aberration and insanity, which made it impossible for him to know what he was doing, and to contract any engagement *avec connaissance de cause* (knowing what he was about). He tells us that the sickness by which he was attacked, and of which he died, was the *delirium tremens*, and that this malady, by its nature, does not leave the person suffering from it any lucid interval, during which, he can enjoy the use of his intellectual faculties, sufficiently to be capable of validly binding himself. It was on the 15th December, 1851, that he made his first visit to the patient; Scott was then in his

own house; the doctor found him with the features swollen, presenting symptoms of erysipelas, so marked, that he declared that he was attacked by an erysipelatous inflammation. He concluded, from the examination he made of the patient, "that he was booked for *delirium tremens*." "He was in great mental perturbation." Having left, after this first visit, the doctor received from Scott himself a note, in which he demanded the pills that he had promised, which surprising him, he returned to see him. These two visits were in the afternoon. The second time he found him at his door, going out into the street; he describes his state and says: "That he had all the characteristic symptoms of *delirium tremens*, setting in with an unusual intensity." The doctor accompanied him to Madame Paquet's, where the doctor remained only a short time. He returned there in the evening; he cannot say if he stayed there all night, but he is sure that he remained there the whole of the night of the 17th. He stayed with him the greatest part of the time, during the whole of his illness, leaving him little, day or night; the whole of the night of the 15th he was labouring under a state of mental hallucination. This mental state became worse during the night of the 16th, "and, generally, there was no marked improvement in his mental capacities, up to the time when he awoke from his sleep, sometime before his decease, on the 18th: On the evening preceding the arrival of Dr. Fisher, which I suppose to have been the 16th, the notary and the priest were present. On the afternoon of the following day, which I take to have been the 17th, Dr. Fisher made his *first visit;* on the evening of the Wednesday, Mr. Scott died. It was not until late on the night of the 17th, that the deceased procured what may be said to have been his first sleep; he could not have had any sound sleep before, as he was not under treatment of *delirium tremens*." On the 17th, Defendant, Paquet, having been informed by the doctor, that Scott was in danger: "she appeared surprised that the deceased was at all connected with danger." Doctor Fisher, after having consulted with Dr. Jamieson: "called afterwards, on the 18th." Dr. Jamieson represents that he was prevented by Defendant from treating the sick man as he ought to have been; Dr. Dorion was called in and refused to interfere: "Mr. Scott was dying or was dead when Dr. Fisher arrived (on the 18th). The disease was not *necessarily fatal*. It was *quite possible death would not result*." He adds: "On the second day of my attendance(the 16th, the day of the marriage), I attended during the greater part of the day, and left to dine, at my boarding house, at about *half past one or two;* when I returned it was towards *evening*. The candles were lighted. I

"had been absent two or three hours more or less." When he returned, there were several persons in the bed room with Scott, the doctor did not enter there, but he recognised the voice of Mr. Ancey, the priest, Archambault, the notary, and Mr. Féré, "passing congratulations on what had taken place." After these had gone, he had caused a question to be put to Scott, by Mme Paquet, to which he answered properly. He adds: "I had not, at the time, the slightest knowledge of what had passed, or what the business "of the priest "and the notary was on the occasion of their visit; it "is from the effect of *delirium tremens* that Scott died." In cross-examination, he says:" From the beginning of his "disease, *I expected that he would recover from his disease.* "On the first, second, and third day, I did not look upon the "disease as a *decidedly mortal one.* I never conveyed to Scott "the idea that *he was* or might be *in danger.*" This evidence is strong, and, if the fate of the cause depended upon it, and if it were not contradicted, the nullity of the marriage would be apparent, on account of mental incapacity, but we will see that this proof is completely destroyed, both by the contradictions it contains, and by the other evidence in the cause. Doctor Fisher, heard on the part of Appellant, confirms the testimony of Dr. Jamieson, in the following respects: He only visited Scott on the 17th, the evening before his death, and the morning after the marriage. He returned the 18th, when Scott was dying, or was already dead, (between 4 and 5 on the 18th.) He said that Scott was attacked with *delirium tremens;* after consultation, it was agreed that they would make him take "brandy punch." He went away under the impression that such would be the treatment. When he saw Scott, he considered him as incapable of speaking reasonably; he put him but few questions. His was a very bad case of *delirium tremens.* He thinks that he died of this disease. The only other witness, who confirms in any way the preceding ones, with regard to the mental state of Scott, at the time in question, is Johanna Kerbey, who was there in the service of Scott. She speaks of the 15th as the time when he left his house to go to Mme Paquet's. He was then in *delirium*: neither this *witness* nor *Dr. Fisher* saw Scott on the 16th, day of the marriage, and, consequently, cannot say whether he was *compos mentis* that day or not. Kerbey only saw him on the 15th, the evening before the marriage. Doctor Fisher only saw him on the 17th, *late* in the *evening*, the day after the marriage. Neither the one nor the other knows how he was on the 16th, in the evening, when the marriage took place. On the part of Plaintiff, on this point of the greatest importance, she had to sustain her pretention on the evidence of

Dr. Jamieson; now, he himself admits that, on the 16th, he left to get his dinner, between half-past one and two o'clock; that he only returned to the sick man after the candles had been lighted. Thus, whatever he may tell us, was the state of his patient when he left him, and when he saw him again in the evening, it is certain that he can say nothing positive as to his state during his absence. Without entering into the details of the proof made on the part of Defendants, Respondents (which is printed at length in their factum), it suffices to state, that, by Mr. Ancey, priest, vicar, at this period, of St. Eustache, it is proved, that, on the 15th December, Scott sent for him, by his farmer, told him that he had a scene that day with his sister, that he wished to marry Mme Paquet, and for that purpose, he had sent for him; informed that a dispensation was necessary, the witness wrote at the request of Scott, a letter to the bishop to obtain it. He then went away again, saying to let him know when the dispensation should have arrived. The dispensation came the following day; a message came from Mr. Scott to inform Mr. Ancey of it. He says: I found Mr. Scott much better than the evening before, calmer, and suffering less. It was about five o'clock in the evening, he was completely conscious. He relates what took place before the marriage, the oath they made him take, and he relates what took place, several years before, between Scott and father Martin, when the same marriage was in question. After the marriage, Scott expressed his satisfaction at what had been done, offered the witness the gold pen which had been used on the occasion; Scott himself gave the names and ages of his children; the ceremony lasted an hour and a half or two hours; neither the 15th, nor the 16th, was Scott in danger when the witness saw him; Archambault, the notary, in place of a contract of marriage, suggested the making of a will; Scott refused, saying that his will was made; that it was a marriage contract he wished to make. He himself dictated the principal clauses of it; above all, he insisted upon a clause of exclusion of community (as proved by the notary). Scott made him promise to return on the morrow; it was not understood that the marriage should be concealed; the witness spoke of it to all he met; on the 17th, he went to see Scott, according to promise, but he was not able to see him; he was dozing: the doctor had forbidden to allow him to be seen; on the 18th, the witness returned; Scott was dying. He was very much surprised at this change; on the witness being asked, to what cause he attributed this change, he answers: "I always thought that the doctor had "given him a dose of opium a little too strong, and, at the "time, I expressed this opinion to several persons; when

"I married him, I had not at all the thought that he *would* "*die of this sickness.* I would not have married him, if I had "not been convinced that he was in the enjoyment of all his "intellectual faculties; I am assured of this, by the conver- "sations I had with him, *before* and *after* the *marriage.*" The very numerous, and very searching question put to this witness, in cross-examination, only afforded him the opportunity of explaining more fully, on what was founded the opinion he gave, and the reasons he had to think and to say: 1° that, at the time of the marriage, the 16th, in the evening, Scott had the full and entire use of all his intellectual faculties; and 2° that, at this time, neither Scott himself, nor Mr. Ancey, nor the other individuals present, were under the impression that he must die of this malady, and that, in fact, they had no reason to think so. This evidence is, on all the important point, corroborated by that of the notary, Archambault, who prepared the contract, and was present at the celebration of the marriage, as well as by the testimony of Grégoire Féré, who was also present on these two occasions. These two witnesses relate particular facts, circumstances in detail, clearly shewing that Scott was not only *compos mentis*, but that he was in the enjoyment of all his faculties. Both agree in saying with Mr. Ancey, that Scott, the whole time that the execution of the contract, and the celebration of the marriage lasted, was seated on his bed, his legs hanging over, and that he dictated to the notaries the principal clauses of the contract; that he insisted, above all, upon the clause of exclusion of community; that he conversed composedly with them; that he himself wrote the names of his children, as well as those of his mother; that he arose of himself to sign the contract and the marriage register, that he refused to sign on his bed, though the offer was made him, saying: "*Badinez-vous? Croyez-vous que je ne suis pas capable d'aller signer?*" (Are you joking? Do you think that I am not able to go and sign?) After the marriage, Scott said that he was content; he was perfectly calm and said: "In case of "accident, it would have pained me to leave my children, "without being legally married." There was not secret made of what was passing. All the people in the house knew it. After the marriage, Scott was well enough; there was no indication whatever to induce one to suppose he was in danger. By these same witnesses, and by the evidence of Father Martin, the important fact was established, that since the year 1845, Scott had wished to celebrate his marriage with Respondent; that, to this end, he had caused Father Martin, who was then in the parish, to be called, and every thing was ready for the celebration of the marriage and that the affair fell through

only, because Scott felt offended at the oath and promise, which they wished to exact from him, as to bringing up his children in the catholic religion. At that time, he repeated several times that the said Marie-M.-M. Paquet was his wife, that he recognized her as such, and that he would get himself married by a protestant minister. Scott often used to speak of his marriage, said that it was a matter that he neglected from day to day. On the 16th December, in presence of Mr. Ancey, of the notary, Archambault, he declared that, if he was not married in 1845, by the ministry of Father Martin, it was that he had not understood the nature of the oath that he wished him to take with respect to his children. There were present at the marriage, on the 16th December, in the room. Scott and Mme Paquet, Mr. Ancey, Archambault, his clerk named Dagenais, Féré, and several other persons going and coming in different parts of the house ; the son of Scott, and Guilbault, stepfather of the Respondent, were also present. This very conclusive and very positive evidence, so well united and so consistent would well suffice, of itself, to destroy that of Dr. Jamieson, in case there were not proof in the declarations and admissions by the doctor himself, which shew that he had not always been, as to the mental state of Scott, during his illness, of the opinion which he has expressed in his deposition, as appears by the following extracts : 1° to Féré, who said to him, on the morning after the marriage, that he was surprised to hear that Scott was deranged, as he had found him so well, the doctor replied : " In these maladies, there are always moments, when a man " may have a good judgment." 2° To the notary, Archambault, who was ill, and under the care of the same doctor, he said the very day when the contract and marriage took place : " that he might go to Scott's who was asking for him to " make his marriage contract." He did not, at all, say that Scott was not in a state to make a contract ; on the contrary, he urged him to go there, saying that there was no danger in his going out, and, at the same time, speaking of Scott, he said to Archambault : " He is sick, but he his tolerably well." Archambault adds : " I said to the doctor that Scott was asking for me to make his contract of marriage. It was thereupon that the doctor told him that he might go there." How can these facts be reconciled with what Dr. Jamieson tells us, in his deposition, that the day of the marriage, he knew nothing of what took place in his absence, that he did not know what the priest and the notary had come to do at Scott's. 3° " To Globensky, on the morning after the mar- " riage, or the death (he is not sure), the doctor said that the " day of his marriage, Scott was completely conscious, and that

" he spoke like a man in possession of his senses ; Globensky " adds : Dr. Jamieson told me that, in order to show me that " Scott was quite conscious when he married." 4° Catherine Goguette, wife of Arpin, proves that, in July or August, 1853, Dr. Jamieson replied, in her presence, to Mme Paquet (Respondent), " that most certainly, Mr. Scott was conscious to the day of his death." The question that Mme Scott had put him was in relation to her contract of marriage with Scott. In his answer, the doctor made use of the word " marriage" with reference to the day of the marriage of Mr. Scott. Nothing in the cause explains these palpable contradictions which were found in Dr. Jamieson's testimony, who, as we have seen, is not only contradicted by the other witnesses, but contradicts himself several times, unless we supposed that the doctor wished to clear himself from the reproach, which appears to have been cast upon him, that he had not been entirely stranger to the turn, altogether extraordinary and sudden, taken by a disease, which he himself, had not considered as dangerous and mortal. Whatever may have been the mental state of Scott before and after marriage, during the day of the 16th December, it is impossible, with the proof, to come to another conclusion, if it be not, that this marriage, at least, took place in a long and peaceful lucid interval, during which he had the use of his mental faculties, and could contract *avec connaissance de cause* (knowing what he was about). The contract of marriage proved to have been dictated to the notary by Scott himself, is assuredly, not the production of a madman ; on the contrary, its wise, prudent and reasonable provisions, prove his intelligence and lucidity of his mind at the time of its execution. The doctor himself, always *admitted this fact*, except in the deposition he has given as witness ; thus we must conclude that he has been wrongly contended, on the part of Appellant, that, at the time of his marriage, Scott was not in a condition to contract. From the same proof, we must also conclude that, at this time, Scott was not at all under the impression, that he must die of the disease, from which he was suffering, that he had no reason whatever to think so, and that, in fact, no one thought so, not even Dr. Jamieson as he admits. We might then leave the cause here, and say that Plaintiff, having failed to make proof of the allegations of her demand, the judgment could not be other, in the Inferior Court, than it has been, to dismiss the action, as has been done, and without going further, this court might content itself with a simple confirmation of this judgment. But, considering the importance of the cause, it is well to express an opinion on the different questions of law which have been raised by means of the exceptions

produced on the part of Respondents. These questions to which it is proper to make allusion, are the following: 1° is the marriage contracted *in extremis*, that is to say, little time before the decease of one of the parties, and when he is attacked with the disease of which he dies, null, *pleno jure*, by operation of law, or, in order to operate this nullity, must it be established that the party was then himself under the conviction that he was attacked with his last illness, and in imminent danger of dying? 2° Admitting that this nullity exists, are the collateral relatives admitted to oppose it to the children, born of a union notoriously and publicly acknowledged, which had preceded such a marriage? 3° If the collateral relatives have the right of invoking the nullity of such a marriage, can they do it after having recognised it themselves, directly or indirectly? 4° Is an isolated member of a family, interested in contesting the status of the children born of a marriage, contended to be illegal and null, admitted to adopt in a court of law, the proceedings required to this effect, alone, and, in his personal name, without the concurrence and intervention of the other members of his family? 5° Was the ordinance of 1639 which decreed the nullity of marriages contracted *in extremis* in France, and should it be here, strictly and rigorously interpreted and restrained within the narrow and confined limits? The greater part of these questions are treated very much at length, in the *factum* of Respondents, and the principles which should serve to guide them are supported by numerous authorities, which are cited there, and which it would be useless to repeat here. It is, however, well to say something on each one of these propositions, and to refer to some authorities, which have not been cited by the parties; observing however, what is of the greatest importance, that all these questions ought to be examined and decided, not only according to the text of the french laws, which regulate for us these matters, but, further, in the spirit of legislation to which these laws owe their origin. Another observation, which we must also make and keep in view, in the examination of all these questions, is the following: upon the validity or the nullity of the marriage disputed, depends the social condition and the fortune of Respondent and of her children brought into the cause with her; according to the law, which governs us, different in that respect from the english law, the subsequent marriage, legally contracted, has a retroactive effect, that of legitimizing the children of the union which preceded it, and of placing the wife and the children born before on the same footing, in all respects, as if a legal marriage had taken place at the time when this union began. This consideration, which does not admit of doubt, easily explains the im-

portance which Respondents attach, and the immense interest which they have, in maintaining the validity of a marriage, which, otherwise, would appear to be absolutely of no consequence, for having been celebrated, only two days before it was dissolved by the death of one of the parties. The matter is far otherwise when we notice that, if this marriage is valid, the mother, in the eye of the law, is regarded the same as if she had always been a lawful wife; the children will, in the case, have all the advantages and privileges arising from being legitimate, while, if the marriage is null, the mother and children lose forever the social *status* they have enjoyed; both the one and the others are reputed illegitimate, with all the blights and the disadvantages which follow from this, and are deprived, the mother of the means of subsistance which have been left her by the man who had always declared and treated her as his lawful companion, and the children, of the considerable property of their father, who loves them, and cherishes them, as his children, regarding et treating them as such; whose fortune, he thought, he had assured, in causing the celebration of a marriage, which he reproached himself with having deferred so long, and which he had decided upon for many years, as he declared, an instant after it had been solemnised, according to the proof of record. Let us now proceed to the consideration of the questions stated above.

I. POINT.

As to the first question, we must hold that; by the laws of France, applicable to the matter, in order to declare null a mariage contracted *in extremis*, the party contesting ought to establish, that, when it was contracted, not only the deceased was attacked with the disease of which he died, but also, and above all, that he knew it, and thought so himself, and that he was convinced that he was then in imminent danger of a near dissolution. On this important point, and which is one of the *motifs* on which is based the judgment appealed from, no positive authority whatever has been cited; it is then well to supply this deficiency in referring to those which follow, namely: *Cochin*, 1 vol., p. 550: "The custom (la coutume) "supposes a man, in such a state of depression, that he regards death as ready to make its final assault, a man who "yields to the violence of his ill, who being unable longer to "resist, abandons all, renounces all." 1 vol., p. 552: "All the authors agree that the disease must be in its last stage, in order to give the right to object to it. "Although a person be not in a good condition, says Charondas, if, at any rate, he is not so overcome with disease, that he cannot give attention to his

affairs, he will be regarded as in health." *Arrêt* of 5th November, 1555. "Dropsy is not a sufficiently strong reason to cause the "annulling of a donation *inter vivos*, according to Mtre Jean-"Marie Ricard, unless it was in the last stage, and inflicted upon "the sick man the assaults of death." P. 551, *Dumoulin* was animated by the same spirit, when he said, on the article 170 of the custom of Blois: *Infirmitatem non nocere, nisi timeatur mors presens aut vicina;* it is, therefore, necessary that the sick man see, so to speak, that death is ready to give him the falal blow. Le Maître, on the article 277: "The diseases "which are not mortal in themselves do not make the dona-"tions styled *inter vivos* to be regarded as *mortis causa.*" Ricard, *Donations*, 1 vol., p. 27 et 28: "We sufficiently understand that all kinds of diseases do not serve to make a donation declared null and made *mortis causa*, when it is drawn as *inter vivos;* but solely those which are of a dangerous character, and which are commonly accompanied by the peril of an approaching death." This results from these expressions of the custom: "Donations made by persons, ill of diseases *from* "*which a speedy death is looked for, by persons in apparent* "*danger of death.*" Pothier, vol., 6, *Donations inter vivos*: "It is necessary that at the time when the donation was made, "the sickness was then declared *mortal*. If the donation was "made at the commencement of a disease, which seemed little "dangerous, although subsequently having got worse, it "brought the donor to the grave, a donation will not be re-"garded as made *mortis causâ*, seeing it was made at a time "when the donor did not think he was dying." Applying to the facts proved in the cause, the principles established by these citations, we cannot help finding the *motif* of the judgment of the court below correct, which goes on to say that Scott, when he contracted the marriage contested, not being under the impression of an imminent death, his subsequent decease which followed close upon the celebration of this marriage, cannot affect its validity.

II. POINT.

On the second question, "the right of collaterals to contest the valididy of the marriage." This right is strongly denied to Appellant, who, as sister of the deceased, is in the collateral line, and who, according to Respondents, has very badly proved this quality of sister which she assumes. In fact, it is abundantly proved that Scott lived for many years with Respondent, that he treated her as his wife, and also treated the children, born of her, as his legitimate children. Several times, there had been question about a marriage between them, and

especially on the occasion which has been mentioned above, on which Father Martin was called to celebrate it. What was done on the 16th December, 1851, was, therefore, only the putting into execution of an intention settled and formed long before, the accomplishment of a promise and of a contract made between the parties; and not only did Scott treat Dame Paquet as his wife, and the other Respondents as his legitimate children, and that notoriously and publicly, but also the one and the others were generally regarded and treated as such by all the world. To change such state of matters, to deprive a wife of her *status* and her position, as a lawful wife, and five children already of a certain age, and some of whom have attained a suitable situation, the person who undertakes so grave and odious a task, must assuredly be well founded in his position, and above all, his right, his capacity, to raise the difficulty, must not in any respect be doubtful. Now is it very certain that the collateral relative has the right to contest, against the wife whom her brother has recognized as his legitimate companion, and treated as such, and against the children who are born of the wife and of him, their state of legitimacy, which he had himself given them and which had been ratified by the public? It appears not only that this right of the collateral relative is doubtful, but also that it is, almost certain, that he does not possess it at all. In support of this opinion, we may refer to the authorities cited in the factum of the Respondents, namely: Daguesseau, 2nd volume, *Plaidoyer* (Pleading) 12, page 288: "You know, gentlemen, and we have learnt it by the "jurisprudence of your *arrêts*, that the complaints of collate- "ral are regarded with little favour, in the tribunal of justice. "If it allows a father to avenge, even after the death of his "son, the injury which the latter did him in marrying against "his will, to extend his indignation and his anger, to the second "generation, and to punish his son, in the persons of his grand- "children, in refusing them not only the hope of his succession, "but also the quality of legitimate children; it did not give "the same power to the collaterals, who did not allege in their "favour, either the prejudice of nature, or the authority of "law, and whom a spirit of self interest alone, induces to dis- "honour the memory of the father, and to distract the position "of the children." Page 291: "We could not give too much "attention to follow with exactitude and even with scrupulo- "sity, the rules which are prescribed to us, both by the canons "and by the ordinances; a judge may tremble with reason, "when he considers that he is perhaps about either to break "the ties which the very hand of God has formed, or confirm "the parties in a criminal engagement. But when death had "broken this engagement, although we must still observe the

" maxims of the church and the state, we may less closely
" cleave to formalities, in order to declare in favour of posses-
" sion, the surest and most inviolable law, when the question
" regards the status of parties." Daguesseau, 2nd volume, *Plai-
doyer* (pleading) 57, pages 69, 70 : " We must regard and pay
" attention to the facts of each cause, to the great considera-
" tion of the public interest, and not establish a general rule
" without exception." In the present case, the circumstances
are the most favourable possible to the Respondents, who
have been recognised by the two other sisters of the Appel-
lant and by the Appellant herself. Daguesseau, 5th volume,
33e *Plaidoyer* (Pleading), page 150 : " For our part, be-
" fore entering upon an examination of the different reasons
" which we have just reminded you of, we will make two
" general observations. The first that the case of a marriage is
" like that of a will and some other acts, with regard to which
" is cited the common law maxim : *Quod ab initio non valet,*
" *tractu temporis convalescere non potest.* In the first place, an
" important distinction is made, which has been explained to
" you of absolute nullities and of those which are only relative
" and introduced in favor of certain persons. When these
" persons by some personal indignity or incapacity, are no
" longer in a state to propose them, then it can be said that
" the marriage is as it were made valid, not that it is without
" a defect, but by the defect of right in the person who wishes
" to have it annulled : *Non jure proprio, sed defectu juris*
" *alieni.*" Page 151 : " If the public advantage demands that
" we should rigorously observe the essential formalities pres-
" cribed by the laws, the same advantage does not allow us to
" expose the status of the children, and the destiny of a
" family to the caprices of an angry father or mother *(much*
" *less a sister)* who would sacrifice them rather to their passion
" than to justice." P. 152 : " A second general observation is,
" that there is a great difference between examining a mar-
" riage which still exists, and a marriage which death has
" severed. In the former case, too much care cannot be taken
" in the discussion of all the nullities ; it is difficult to halt at
" pleas in bar *(fins de non-recevoir),* because there is yet
" time to repair the defects which are found there ; judges
" ought to tremble with the fear either of severing ties which
" the very hand of God has formed, or of confirming an ille-
" gitimate tie, which the Church condemns. But when death
" has anticipated their judgment, *and the only question is*
" *concerning the status of the children,* pleas in the bar *(fins*
" *de non-recevoir)* have greater weight, and may be based
" upon circumstances sufficiently strong to have a decisive au-
" thority." Possession, cohabitation, the approbation of the

family, the silence of the mother, the good faith of the wife, *every thing is listened to in favour of the children*, when the marriage *of which they are born, has otherwise nothing odious in it.*" P. 153 : "Where it is said, that the marriage in ques-"tion, would have been celebrated with all kinds of forma-"lities, if the contracting parties had had their domicile at "Paris." In our case, the marriage of Mme Scott would have been celebrated as far back as 1855, if there had not been the difficulty about the oath raised by Father Martin, a jesuit. This *arrêt* is very important, inasmuch as the pleas raised by the defence had prevailed *even* against the mother. *Arrêt* 3rd. August, 1694. *Journal des Audiences*, vol. 4, chapter 1st, p. 409. A collateral relative cannot appeal *comme d'abus*, as to the celebration of the marriage of a *sien parent* (*suus relative*) under pretext that there are nullities in the celebration. P. 410. "The advocate general Daguesseau, who made a very beau-"tiful address, having explained the facts and the pleading "with much clearness, narrowed down the whole contestation "to the two propositions mentioned above, and said with "regard to the first, there was no difficulty that a collateral "relative could not make an appeal *comme d'abus* as to the "celebration of a marriage ; that there was only the fa-"ther and mother who were admissible to do it ; that it "was a very sure maxim, founded upon the judgments of "the courts ; that if it were sometimes allowed to collaterals "to appeal *comme d'abus*, it was when their relative disho-"noured the family by an unworthy alliance, which was not "the present case." The marriage was confirmed and declared valid although it had begun *ab illicitis*, and notwithstanding the ordinances and the custom. And it is added, that there was much the appearance, that what obliged the Appellant to contest the status of the children, was the desire that he had to avoid paying what he owed to the succession of Jean Bignon, their father. *Répertoire* Guyot, vol. XI, *verbo* mariage, page 368 and following to 373. There are reported there several notable *arrêts* which have rejected the demand of collaterals, even where there had not been any recognition of the children since the death of the father. In particular, in the case of the chevalier de Flavigny married to his servant. There was here disparity of condition, and a clandestine marriage ; however the comte de Flavigny, brother of the decease, was refused in his demand to contest the marriage which he had never recognised and although he offered to support the mother and the child, the court granted civil effects to the marriage by *arrêt* of date 22nd August, 1758, page 371. Page 372 : There is reported an *arrêt* of the 31st of December 1779, when it is said that the advocate General, Seguier, successfully ap-

plied this law of the emperors Marcus and Lucius, which does so much honor to their reign: *Movemur et temporis diuturnitate et numero liberorum vestrorum.* The woman Bouchard had a numerous family and she was besides worthy of the application of this law. To all these citations, we must add one of great weight, and very positive on this subject; it is from Merlin, *Questions de droit*, 10 vol., sect. 5, page 19, when he says: " Yes! certainly the Court of Appeals has " wrongly decided (in entertaining the demands of collateral " relative against a marriage which has peaceably subsisted " till the death of their relative). Yes! certainly the court has " wrongly decided, or at any rate it has decided against the " universal jurisprudence of the ancien tribunals. We could " cite more than 50 *arrêts* which have declared collaterals, " *purely and simply*, as not admissible to allege even reasons " of absolute nullity against marriages." Merlin only cites a single *arrêt* rendered by the parliament of Paris, the 31st December, 1779 on the conclusions of the advocate general Seguier. According to what precedes we cannot doubt but that Appellant was not qualified to contest the validity of the marriage and the legitimacy of the children of their brother, giving them the quality of heirs and legal representatives of their father, William H. Scott, and demanding a condemnation against them, in these qualities. *Vide* schedules n°s 18 et 21, folios 18 et 23.

III. POINT.

The facts given in the factum of Respondents, as establishing the acknowledgment by Appellant of the marriage of her brother and legitimacy of his children, appear established by the proof, and sufficient in law, to prevent her after such acknowledgments from contesting this marriage and this legitimacy, called in question in the present action. The time that Appellant has allowed to pass before putting forth her claims, appears little fitted to shew that she was herself strongly convinced of her right. In point of fact, there has certainly been an acknowledgment, on the part of Appellant; now in law this acknowledgment is fatal to her. Guyot, *Répertoire*, vol. XI, *verbo* mariage, p. 363, § 4: " With regard to collaterals, " the law does not admit them, in the lifetime of husband and " wife, and if they recognize the marriage after the death of " the conjoints, they are not admitted to contest its civil ef- " fects, *even when the reasons* D'ABUS *are absolute.*" *Vide*, Guyot already cited, from pages 368 et 373; Le Merle, *Of pleas in bar (fins de non-recevoir)*, page 304: " With regard " to even absolute nullities, such as those resulting from want

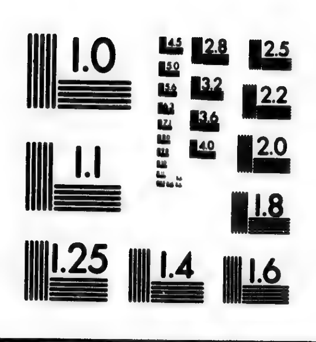
"of celebration before the proper priest, there had been variations in the jurisprudence, and even until the *arrêt* of the 9th April, 1696, the maxim was observed that the sole quality of collateral, rendered a person not admissible in the appeal *comme d'abus*, unless the matter concerned a relative who dishonoured the family by an unworthy alliance. At this time, and above all after the Edict of the month of March, 1697, it became a constant rule that when there were absolute reasons, which made an essential nullity in the celebration of marriages, the collaterals, after the death of father and mother, were entitled, not to come directly against these marriages, for they were not listened to, but to attack them by appeal *comme d'abus*, and incidentally by way of exception, to defend themselves against a demand by the widow for *her dower*, or by children for a division of the succession falling to the family. But when collaterals or other relatives had *approved* or formally *recognized* the marriage, after the death of husband or wife, that is to say, when their rights had arisen and were rested, they were declared *not admissible*. It may further be said with reference to civil marriages, which involved even absolute nullities, that the new laws do not run counter to this last state of the law."

In the present case, Appellant only demanded the nullity of the marriage in 1854, three years after its celebration, and after having recognized it, as well as the children born of it, by the transfer which she made to her two sisters Barbara and Jane, who as well for the share of Appellant as for their own brought an action, based upon this transfer in July 1853, against the minor children of their brother, giving them the quality of heirs and legal representatives of their father, William H. Scott, and demanding a condemnation against them, in these qualities. *Vide* Schedules Nos. 18 et 21, folios 18 et 23.

IV. POINT.

The status of the parties have been recognized by certain members of the family, can it be contested by the others? The sisters of Appellant, Barbara and Jane, have recognized the qualities of Respondents, as representing the succession of their brother, in suing them to declare executory against them, a judgment which they had against his succession. Now, according to Mr. Cochin, cited by Respondents, 4th vol., p. 597, cause 110, the *status*, condition of the parties being indivisible, cannot be recognized by certain members of the family and contested by the others. The gist of his proposition being, that when the status of a child is assured with respect

IMAGE EVALUATION
TEST TARGET (MT-3)



6"


2.8
2.5
3.2
2.2
3.6
2.0
1.8
1.1
1.0

to one part of the family, the other relatives cannot attack it. If such be the law, two sisters out of three, having recognized the *status* of Respondents, the third, Appellant, is excluded from the right of contesting it to them; otherwise, the two sisters who have recognised the legitimacy of Respondents, not being able longer to contest it, and with respect to them, Respondents requiring in all respects whatever, to be regarded forever as legitimate; if we admit that, after this, Appellant could contest, with success, this same legitimacy, this anomaly would result from this fact, that as to one portion of the same family, Respondents would be legitimate, while, for the other, they would pass for and be treated as illegitimate. This discordance is neither just nor tolerable, and could not be legal; better to adopt the maxim of Cochin: "When the *status* of a child is assured, with respect to one "portion of the family, the other relatives cannot attack it." *Cochin*, vol. 4, cause 110, p. 597: "Would the minor be re-"cognized as capable with respect to one portion of his fami-"ly, and incapable with respect to another portion. The status "of men is indivisible; what they are constantly with regard "to some, they are the same, with regard to the others, and "principally in the bosom of one and the same family, it is "not possible to conceive that a child is at once capable and "incapable of all successions, according to the different mem-"bers of the family who present themselves."

V. POINT.

It is useless to enter into any details on this 5th question, namely, to know whether the ordinance of 1639, on which is founded the nullity of marriages contracted *in extremis*, was in France, and ought here to be rigorously restricted within its stricted terms, and ought to be interpreted favourably to the validity of such marriages. It is sufficient to refer to the long list of authorities, which are found in support of this proposition in the factum of Respondents, authorities which leave no doubt on the subject. *Journal du Palais*, vol. 1, p. 710: "We may add "that the ordinance of 1639, is a penal and new law. As a penal "law, it does not admit of extension; as a new law, its terms are "not favorable against the disposition of the old law." Cochin, vol. 4, p. 207 and following, on the spirit of the article 6 of the ordinance of 1639 concerning marriages *extremis*: "The true, "the only case to apply the ordinance is when a man marries "at a time, when he feels himself dying, when the violence of "disease, and the impotency of remedies, makes him feel that "life is ready to depart, when he does not longer count on any "aid; *at the extremity of life*, that is to say when the stroke

" of death ready to fall upon them is expected at any moment, " and they only unite themselves to those they marry with " the view of being immediately and for ever separated from " them," which is by no means the case here. " Unforeseen " death does not render the marriage subject to the article 6 of " the ordinance of 1639. (It was not expected by Dr. Jamieson " that Scott would die of the disease he was suffering from. He " expected he would recover.) Page 206: "No one dare maintain " that if the husband came to die shortly after the marriage " by an unforeseen death, this accident would change the right " acquired to the wife and to the children by a solemn mar- " riage." Page 209, *arrêt* of 29th March, 1599, confirming the marriage of a man who died the very day on which he caused himself to be carried to the church in order to receive the nuptial benediction. In our case, the sole reason why Scott did not go to the church, was that being a protestant he would not go there, and thence the necessity of the marriage at his domicile. Page 592 et 593, on the spirit of the ordinance: " 1° it must be agreed that it is an entirely new disposition, " and which had not its foundation in any previous ordinance; " 2° it is a penal law, the rigour of which is extreme, seeing " that both the guilty and all his posterity are involved in the " same penalty; 3° it would appear that the legislator only " had in view, these shameful alliances which cover families " with disgrace." *Journal des audiences*, vol. 3, lib. 3, ch. 16, page 472, col. 1st: " We understand by these words, extremity " of life (*extrémité de la vie*), the time when a sick man does " not see hope of returning health. His time is so near death, " that we may say in a manner that the sick man ceases to live. " *Arrêt* of 18th May, 1685. Marriage of Sieur Talon de Rouval " with his servant made *in extremis*, declared valid with civil " effects and collateral relatives declared not receivable to con- " test it." *Bourjon*, vol. 1, note on No 60, p. 14: " Nevertheless " a marriage contracted *in extremis* by a person who being in " full health and before his malady, had done what was in his " power to contract it, but was prevented by oppositions or " other difficulties, would not be in the case of being deprived " of civil effects, thus decided *by arrêt* of the parliament of " Normandy 29th July, 1719, reported in the 6th volume of " the *Journal des audiences*." Pothier, vol. 3, *Contract of marriage*, No 432: " Although the marriage was *in extremis*, " if the person being in full health had done what in his power " to contract it, and had been prevented by the obstacle which " had been interposed, and by oppositions which had been " made from which he could not sooner obtain relief, such a " marriage should not be deprived of civil effects; no blame " can be imputed to this individual, it cannot be said that he

" waited till he was *in extremis*, in order to contract his mar-
" riage; it is therefore not the case provided by the law." This was very wisely adjudged by an *arrêt* of the parliament of Normandy of 29th July, 1719. *Journal des audiences*, vol. 6, ch. 58, p. 474. *Arrêt* of the 29th July, 1719, cited above by Bourjon and Pothier, dismissing the demand of the mother; marriage of the Sieur de la Varenne with Catherine Habert, p. 475: " Where it is reported that the marriage was celebrated
" on the 27th July at two o'clock after midnight, when Sieur
" de la Varenne accompanied by the brother Cosme, Capucin,
" his physician, was carried in a chair, agonized, and reduced
" to such an extremity, that they were obliged to carry him
" back to his bed before the ceremony was entirely completed;
" and the day after, the 28th, the Sieur de la Varenne died
" without having received extreme-unction." Merlin, *Cour de Cassation*, Répertoire, *verbo* Mariage, vol. 19, sec. 9, art. 3. *Arrêt* granting civil effects to the marriage of the Sieur Thomasseau with Anne Duval: " Considering that the penal dispo-
" sition pronounced by these laws against marriages *in extre-*
" *mis* can evidently only be applied to the case in which the
" parties have voluntarily waited in order to contract a mar-
" riage till the end of their lives, and when it is recognized
" that they had not previously had the same intention; but
" that we cannot without wounding at the same time justice,
" public interest and the *uniform jurisprudence* of the tribu-
" nals, apply the vigour of these laws to the case where the par-
" ties, constantly *animated* by a desire to be united by the
" ties of marriage, have been prevented by a *vis major*, or
" *what is the same thing*, by obstacles which it was *morally*
" impossible for them to surmount, until a period very near to
" the end of their life. Considering that in the present case, the
" Plaintiff in appeal, articulated and alleged that similar obs-
" tacles had existed and had alone prevented Anne Duval and
" the Sieur Thomasseau from marrying before the 19th of
" May, 1790, the evening before the death of the latter,
" circumstances the proof of which had rendered without
" application, the general disposition of the laws cited above.
" That thus, in rejecting this proof, and in nevertheless apply-
" ing the deprivation of civil effects to the marriage in question,
" the judges whose *arrêt* is attacked have displaced and falsely
" applied the ordinance of 1639 and the edict of 1697." For these reasons, the court quashes and annuls the judgment (*arrêt*) rendered by the Court of Appeals of Bordeaux, the 20th prairial, year 9. Bardet, vol. 2, p. 111, ch. 46. *Arrêt* of 30th December, 1632; Bardet, vol. 2, p. 167, ch. 28. *Arrêt* of 12 May, 1633; Bardet, vol. 2, p. 325, ch. 10. *Arrêt* of 4 March, 1536; Bardet, vol. 2, p. 544, ch. 33. *Arrêt* of 9 August, 1639. These last judg-

ments (*Arrêts*) prove the spirit of the jurisprudence in relation to marriages *in extremis*, before the ordinance of 1639, an exceptional and new law and contrary to the common and ecclesiastic law. To sum up, we will say in the first place, with the Inferior Court, that, on the *défense au fond en fait* (general issue) the action of Appellant ought to be dismissed, inasmuch as she has not succeeded in establishing the essential facts which she alleged in her declaration, namely, that, at the time of the marriage, Scott did not enjoy his intellectual faculties, or that he was under the impression that he must die shortly, of the malady of which he was attacked. And, moreover, we may add that, even, if, on this point, there might exist some doubt, Appellant could not succeed in her demand, for several, if not, for all the reasons asserted by Respondents, in their exceptions, and stated above. We are therefore of opinion that the judgment appealed from is correct and ought to be confirmed.

DUVAL, J., concurred.

MEREDITH, J.: I fully concur in the foregoing observations, in so far as they relate to the matters put in issue by the declaration of Plaintiff in the court below; and, being of opinion, with Mr. Justice Duval, and Mr. Justice Caron, and the judges in the court below, that Plaintiff had wholly failed to establish her case, I deemed unnecessary to consider the matters alleged, by way of exception, in the pleading of Defendants.

AYLWIN, J., *dissentiens*: In reviewing this case, although the *fins de non-recevoir* pleaded by Respondents would seem to present themselves first to be disposed of, as the consideration of them involves questions connected with the merits, I shall depart from the usual order, and postponing them, and even the issues raised on the declaration and the perpetual exceptions, I shall attach myself, first, to what, in my view, is the chief point to be determined. In fact, did any marriage take place between William Henry Scott and Respondent Marie-M. Paquet, to create a legal *vinculum* between them? If, indeed, the parties had admitted expressly such a marriage in fact, and sought only to have its nullity pronounced, or its validity declared, the enquiry would have been much limited; but Respondents have set up by their exception, "que W. H. "Scott a, enfin, le 16 décembre 1851, dans la paroisse de "St-Eustache, contracté un mariage légitimement et légale-"ment, en présence d'un prêtre catholique bien et dûment "autorisé à faire la célébration de ce mariage." Appellant has denied this by her general answer to the exception. The issue is *ne unques accouple en loyal matrimonie*. In the trial of this issue regard must be had to the nature and description of the

proof required by the law of Lower Canada. The ordinance of Louis the XIII, à Paris, en janvier 1629, article 41, is to the following effect : " Nous défendons à tous juges, même à ceux " de cour d'église, de recevoir à l'avenir aucune preuve par " témoins et autres que par escript en fait de mariage fors et " réservé entre personnes de village, basse et vile condition. A " là charge néanmoins que la preuve n'en puisse être admise " que des plus proches parents de l'une et de l'autre des parties " et au nombre de six pour le moins." Conférence de Guenois, livre 5, tit. 2, *Des mariages*, vol. 1, pp. 705-6 : " La déposition " du curé, ni celle des parents et des témoins, ni de la vérité " du mariage, n'a pas même été jugée suffisante par l'ordon- " nance de 1667, tit. 20, art. 7, 9, 10, puisqu'elle a défendu " précisément de recevoir la preuve des mariages autrement " que par un acte *de célébration*, signé du curé et des témoins " à l'instant du mariage et inséré dans les régistres de la " paroisse où il a été contracté." Danty, *Preuve par témoin*, p. 97 : " En un mot depuis le concile de Trente et l'ordonnance " de Blois (Henry III, anno 1519, article 40), on ne reconnoist " plus en France les mariages présumés et ainsi la preuve par " témoins n'en peut jamais être admise, parce qu'elle serait " inutile," *loco citato*. In proof of the solemnisation or " *célé- bration* " relied upon by them, Respondents have produced the following extrait du régistre des baptêmes, mariages et sépultures de la paroisse de St. Eustache, district et diocèse de Montréal, pour l'année 1851, and no other *preuve par écrit* or documentary evidence : " Aujourd'hui, le seize de décembre " mil huit cent cinquante et un, vu la dispense de toute publi- " cation de mariage, ainsi que celle du temps prohibé par " l'Eglise, accordée par Mgr Ignace Bourget, évêque de Mont- " réal, comme il appert par sa lettre en date de ce jour, nous " prêtre vicaire soussigné, autorisé à cet effet, avons assisté " comme témoin au consentement de mariage donné et reçu " par William Henry Scott, marchand, domicilié en cette " paroisse, fils majeur du défunct William Scott et de défuncte " Catherine Ferguson, de Montréal, d'une part, et Marie-Mar- " guerite-Maurice Paquet, aussi domiciliée en cette paroisse, " fille majeure de Joseph-Maurice Paquet, décédé, et de Marie- " Marguerite-Ignace Paquet, d'autre part, et ce en présence de " MM. Jean-Baptiste Archambault, notaire public, et Grégoire " Féré, lesquels ainsi que les parties contractantes ont signé avec " nous, et ce après avoir obtenu de la partie protestante ce qui " est exigé de la Cour de Rome en pareille circonstance. Les dits " époux reconnaissent, par le présent acte, pour leurs enfants " légitimes Henry Williams, âgé de vingt ans, Nicolas, âgé de " dix-sept ans, Caroline, âgée de quinze ans, James, âgé de " quatorze ans, et François Henry, âgé de douze ans, qui ont été

" baptisés à l'église catholique de St-Eustache, excepté Nicolas " dans celle de Ste-Rose." (Signé) MARIE-MARGUERITE-MAU- " RICE PAQUET, W. H. SCOTT, GRÉGOIRE FÉRÉ, J. B. ARCHAM- " BAULT, F. ANCÉ, Prêtre, Vicaire." This certificate asserts a special power or authority to act, given not to the *curé* or rector, but his *vicaire* or curate. It is to be presumed that the thing done was according to the power given. Now what was done ? Avons assisté *comme témoin au consentement du mariage donné et reçu, etc.; et ce, après avoir obtenu de la partie protestante ce qu'est exigé par la cour de Rome en pareille circonstance.* F. Ancé, being the curate of the rector of St. Eustache, attends as a witness of the consent to marry, given and received. There were also present Jean-Bte-Archambault and Grégoire Féré, two laymen. What is there to distinguish their presence or their testimony from that of Mr. Ancé ? Nothing, except that they state no authority for their presence, whereas Mr. Ancé professes to require an authority to *assister comme témoin*, and to act under it. Where is the law under which the testimony of Mr. Ancé is admissible in proof not of a marriage *célébré* or solemnized, but of *consentement de mariage donné et reçu* ? We have seen prohibition of *la preuve par témoins*, of *célébration*, by the legislative power of the King of France, *même à ceux de cour d'Eglise.* Let it now be ascertained whether a *consentement de mariage* may be thus evidenced. " 3° *Les promesses de mariage* par paroles " de présent qui étaient autrefois regardées comme un mariage " commencé, comme il a déjà été observé, ne sont plus permises, " et l'article 44 de l'Ordonnance de Blois défend même aux notaires d'en recevoir les actes ; ainsi la preuve en serait inutile." Danty, page 103. " Les promesses de mariage se font " *per verba de præsenti, aut per verba de futuro* ; que l'ordonnance dit par paroles de présent, ou par paroles de futur. " Celles qui se font par paroles de futur ont accoutumé de se " faire par-devant les notaires et tabellions, s'il s'en passe contract, ou en présence de parents ou amis. Celles qui se font " par paroles de présent, se font ou doivent se faire en face de " sainte Eglise ès mains du Prêtre ou de celui qui vague au ministère." 1 Guenois, 706, note 13, sur l'article 44 de l'ordonnance de Blois. The certificate of Mr. Ancé does not state any consent *in facie Ecclesiæ*, or any clerical act done by him. The Ordonnance de Louis XIII à St. Germain-en-Laye, le 26 novembre 1639, I Guenois, p. 707, article 1, prescribes " qu'à " célébration du mariage assisteront quatre témoins dignes de " foi, outre le curé, qui *recevra* le consentement des parties, "*et les conjoindra en mariage* suivant la forme pratiquée en l'Eglise." With reference to the curé, Danty says, page 102 : " Il est donc constant, suivant l'opinion commune de l'Ecole,

" que le curé n'est que le témoin nécessaire du mariage. *Ut* " *conventio partium habeatur pro legitimo contractu, et sufficiente ad rationem sacramenti ;* ainsi qu'en parle Cabassutius : *In theoriâ Jur. canon*, l. 7, ch. 17, sur quoi Fra. " Paolo, en son *Histoire du concile de Trente*, l. 8, a remarqué " que le concile de Trente en ordonnant la présence du propre " curé, a changé un point déjà établi, savoir : que tout mariage fait en présence de trois témoins était bon et qu'au lieu " de l'un des témoins il a substitué le curé." The *vicaire*, acting in the ordinary course for the *curé*, is to be considered as the curé. For what purpose ? *pour recevoir le consentement et conjoindre en mariage.* " Cette présence du curé requise " par nos lois pour la validité des mariages, n'est pas une pré- " sence purement passive ; c'est *un fait et un ministère du* " *curé*, qui doit recevoir le consentement des parties, et leur " donner la bénédiction nuptiale." Pothier, *Du mariage*, part. 4, chap. 1, sec. 3, art. 1, § 5, No 350. The definition of marriage by Modestinus is *nuptiæ sunt " conjunctio " maris et feminæ, consortium omnis vitæ, divini et humani juris communicatio.* Dig. 23, 2, 1, de ritu nuptiarum. " On peut défi- " nir le mariage (says Pothier), un contrat revêtu des formes " prescrites par les lois, par lequel un homme et une femme " habiles à faire ensemble ce contrat, s'engageant réciproque- " ment l'un envers l'autre à demeurer toute leur vie ensemble " dans l'union qui doit être entre un époux et une épouse." " Il suit de cette définition, qu'un mariage où l'on n'aurait pas " observé quelqu'une des formalités que les lois requièrent " pour sa validité ou qui aurait été contracté entre des per- " sonnes que les lois rendent inhabiles n'est pas un véritable " mariage." Mariage, partie 1, chap. 1, No 3. It is evident from the form of the certificate, that the old pretensions of the canonists and of the schoolmen are now attempted to be revived in Lower Canada, country to law. The doctrine is again asserted " que les parties contractantes sont elles-mêmes " les ministres du sacrement, et qu'elles se l'administrent l'une " à l'autre par leur mutuel consentement ; ils ajoutent qu'elle " n'est pas essentiellement nécessaire pour la validité du ma- " riage et que le curé n'est que le témoin nécessaire, sans la pré- " sence duquel le mariage est déclaré nul, parce qu'il est réputé " clandestin suivant le concile de Trente, session 24, et l'art. 40, " de l'Ordonnance de Blois, et cette opinion est reçue communé- " ment dans l'Ecole." Danty, p. 101. But the priest must officiate as the officer of the law, and perform what the law requires. He must be active, not passive, or his presence is worthless. He must be present, 1° pour recevoir le consentement; 2° donner la bénédiction nuptiale. " Dans les rituels anciens il disait : *Ego, tanquam Dei et Ecclesiæ minister vos conjungo.*"

Mémoire à la fin du 57e Plaidoyer de D'Aguesseau, vol. 5, p. 166, note (a). " Parmi les nombreuses formules ecclésias-" tiques (says Michelet, in his *Origines du droit françois*, pages " 33, 34), nous donnerons de préférence celles qui appartien-" nent aux rituels de nos Eglises de France." *Rituel de Rouen.* " Nous avons fait les bans en cette sainte Eglise, par trois di-" manches continues, entre tel N. d'une part, et tel N. d'autre " part, et n'y avons trouvé nul empêchement ; pourquoi le ma-" riage ne doye bien et loyallement assembler ; encore de re-" chief nous les faisons première fois, seconde fois, tiers fois et " quatre fois d'abondant. S'il y a aucun ou aucune qui y sache " empêchement par quoi le mariage ne se doye assembler, si " le die. Car, qui maintenant s'en taira et après en parlera, on " le dénonchera excommunée. (Personne n'empêchant, le prêtre " dit à l'époux) : N. veux-tu avoir N. à femme et épouse, et la " garder saine en enferme, et lui faire loyale partie de ton " corps et de tes biens ; ne pour pire, ne pour meilleure tu ne " la changeras tous le temps de sa vie. Alors l'époux répond : " Oui. Que lui bailles-tu ? Ma foy." *Rituel d'Amiens :* " Le jour " des noces, à la porte de l'église, le prêtre dit : Bonnes gens, " nous sommes ici assemblés pour faire le mariage de N. et N. " dont avons fait les bans. Pourquoi s'il a nul qui y sache au-" cun empêchement, si le die présentement si haut que on " l'oye sur peinement d'excommuniment. Le prêtre demande : " Luy fut-elle oncques donnée ? R. Ouy, ou nenny. Donnez lui. " Or le me rendez. Comme avez à nom ? N. Et vous, comment ? " N. Jean, voulez-vous cette femme, qui a nom Marie pour " nom de baptesme, à femme et à épouse ? Sire, ouy. Mary, " voulez-vous cet homme, qui a nom N. pour nom de bap-" tesme, à mary et à épouse ? Sire, ouy. Jean, je vous donne " Marie ; Marie, je vous donne Jean." Dans le rituel de l'E-" glise de Reims (1585) on lit : " Le Prêtre qui doit bénir l'an-" neau, demande treize deniers qu'il reçoit du consentement " mutuel des deux époux ; le fiancé prend ensuite l'anneau et " trois deniers (les dix autres étant réservés pour le prêtre), et " par la main du prêtre il place cet anneau au quatrième doigt " de la main de la fiancée, en disant après le prêtre : N. Je " vous épouse ; sur le doigt du milieu et l'annulaire, auquel il " passe l'anneau ; et de mon cœur je vous honore. Posant alors " les trois deniers dans la main droite ou dans la bourse de l'é-" pousée, il ajoute : et de mes biens je vous doue." M. l'avocat général de Lamoignon says, in the 1er *Journal du Palais*, p. 631, arrêt du 5 février, 1675 : " Quelques solemnités que la " concile de Trente, ait établies pour la validité du mariage ; " on prétend qu'il ne demande que la présence du propre curé, " et l'on veut en induire que son *ministère n'est pas néces-" saire*, parce que lorsque le même concile parle du sacre-

" ment de Confirmation, et de l'Ordre, il ne dit pas qu'il sera
" conféré, *præsente Episcopo*; mais que ce sera l'Evêque qui en
" *sera le ministre.* Toutefois quelle apparence y a-t-il que
" cette présence du propre curé, qui est si *essentielle* à la vali-
" dité du mariage, soit *une présence muette sans aucune fonc-*
" *tion ni ministère ?* Ne peut-on pas soutenir que ce concile
" a été d'un autre sentiment puisque lorsqu'il prescrit la
" forme du mariage, il veut que le curé se serve de ces termes:
" *Ego vos conjungo,*" pour marquer que c'est lui qui est le mi-
" nistre de ce sacrement et qui l'applique aux parties, lorsqu'il
" voit qu'elles ont *toutes les dispositions nécessaires*, qui con-
" sistent *dans le consentement mutuel de l'un et de l'autre.*"
" Si nullum legitimum opponatur impedimentum, ad celebra-
" tionem matrimonii in facie Ecclesiæ procedatur. Ubi paro-
" chus *viro et muliere interrogatis* et eorum mutuo consensu
" intellecto, vel dicat, *Ego vos in matrimonium conjungo*, in
" nomine Patris, etc., vel *aliis utatur verbis juxta* receptum
" uniuscujusque. Province ice. ritum. Posthæc præmissæ mo-
" nitione de indissolubii matrimonii vinculo monet primo
" sponsum est secum et intelligibiliter pronuntiet formam con-
" tractus matrimonialis; sive verba distincte consensum ma-
" trimonialem exprimentia, quibus pronuntiatis, eadem pro-
" ponit sponsæ pronuntianda, ac dein data, sic utrinque fide
" dicat Sacerdos. Concil Trident, sess. 24, de reformat., cap. 1;
" et Ego, tanquam Dei minister, vos in matrimonium conjun-
" go in nomine, etc. Van Espen, Juris. Eccles., Pars. 2, cap. 6,
" No 7; vol. 1, p. 396. Edit. Colon. Agrip., anno 1729." " M.
" Louet, dans son *Recueil d'arrêts*, lett. M., chap. 26, nous ap-
" prend, que depuis l'Ordonnance de Blois, on ne reçoit plus
" *d'autre preuve de mariage* que celle qui résulte de la béné-
" diction nuptiale; il rapporte un arrêt de l'année 1606, qui
" l'a ainsi jugé. *Nova quadam jurisprudentia cap. veniens et*
" *cap. is qui fidem de sponsalibus apud Gregorium, non am-*
" *plius observantur in hoc Regno, sed Regia constitutione Ble-*
" *sensi*, art. 40, *matrimonia ex carnali copula non præsumun-*
" *tur, sed benedictione sacerdotali probantur et sic judicavit*
" *Senatus Paris.* Arrêts d'Augeard, vol 1, page 216. Arrêt du
" 12 mars 1693. Il subsiste *quoad fœdus et sacramentum*
" quoiqu'il ne produise pas d'effets civils. Ceux qui croient
" que le prêtre est le ministre du sacrement sont d'un senti-
" ment contraire; ils estiment que les mariages sans la béné-
" diction du prêtre *sont absolument nuls* et l'on verra ci-des-
" sous *que les Parlements suivent cette règle.* Cependant
" quant au for de la conscience, l'Eglise ne s'est pas encore
" expliquée sur la validité de ces mariages." Durand de Maillane, *Dictionnaire canon.*, voce *Clandestin*, vol. 1, p. 523; edit. in-quarto, Lyons, 1770: " La présence du curé, qui est

" requise par les Ordonnances et par le concile de Trente pour " la validité des mariages n'est point une simple *présence cor-* " *porelle,* qui pourrait être forcée et involontaire; mais elle " doit être accompagnée de la part du curé d'un *acquiesce-* " *ment et de l'approbation donnés au nom de l'Eglise au con-* " *sentement respectif des parties, et de la bénédiction nuptiale,* " Arrêt de 1676. Les termes du concile et de l'Ordonnance " marquent une présence volontaire du curé. En effet ces lois " portent que le curé *recevra* le consentement des parties " et qu'il leur donnera la bénédiction nuptiale suivant l'usage " de l'Eglise." De Héricourt, *Loix eccles.*, chap. 5, art. 1, No 27, p. 474 et notes. Quoique le même chapitre premier du concile de Trente requière la bénédiction du curé, avec les paroles qu'il rapporte, ou autres, suivant l'usage de chaque province, il ne résulte point un empêchement dirimant de l'omission qui en serait faite ; en effet, les canonistes romains, dit Fagnan, ne croyent pas qu'il soit nécessaire que *le curé parle* en mariant, parce qu'un témoin peut être témoin d'un fait, quoiqu'il garde le silence. 4. En France, *les Ordonnances et la jurisprudence des Arrêts ont adopté cet empêchement dirimant,* établi par le concile de Trente, pour empêcher les mariages clandestins, et ont même été plus loin ; en voici les dispositions. Article 10, *Ordonnance de Blois*, Lacombe, *Jurisprudence canonique,* voce *empêchement,* article 1, n°s 3 et 4, p. 280 : " Ce que nous avons dit que le prêtre qui célèbre le mariage n'est pas un simple témoin, et qu'il y exerce un ministère, n'est pas contraire à ce qu'enseignent les théologiens que les parties qui contractent mariage sont elles-mêmes les ministres du sacrement de Mariage. Il est vrai qu'ils en sont les ministres quant à ce qui est de sa substance et qu'elles se l'administrent réciproquement par leur consentement et la déclaration extérieure qu'elles se font de ce consentement ; mais le prêtre est, de son côté, le ministre des solennités que l'Eglise et le prince ont jugé à propos d'ajouter au mariage pour sa validité, et il est préposé par l'Eglise et par le prince pour exercer ce ministère. Pothier, *Du Contrat de mariage,* partie 4, cap. 1, sect. 3, art. 1, par. 5, n° 353, vol. 3, p. 293, 1st edition 1781. The parish registers of Lower Canada, both in the French times and since the conquest, have been carefully kept, and furnish valuable material for our past history. The forms generally used in the entry of marriages are " avec les cérémonies prescrites, nous prêtre, curé (or vicaire, as the case may be) avons reçu leur mutuel consentement," or " ai reçu leur mutuel consentement de mariage et leur ai donné la bénédiction nuptiale, suivant la formule prescrite." In the present case, there is no acceptance by the priest of the plighted faith of the parties. *No conjunc-*

tio in matrimonium. No benediction nuptiale. No priestly act whatever. No official act as a public functionary, *préposé par le prince.* In the absence of all this, it is carefully recorded " ce après avoir obtenu de la partie protestante ce qui est exigé par la cour de Rome, en pareille circonstance." What this may be, is not stated ; but most certainly, the certificate and entry are not improved by the addition. The french kings kept a watchful eye over the encroachments of the Court of Rome upon their temporal authority ; *les libertés de l'Eglise gallicane,* were in full force, at the period of the conquest of Canada, they are a portion of our municipal law in Lower Canada, secured to us by the treaty of peace, and the cession of the country to Great Britain as well as the Quebec Act. The legislative power of the See of Rome no more can be recognized now than it would have been in France prior to 1759, or it would be at this hour. Whatever, then, Mr. Ancé may have obtained, it was not obtained in the discharge of his duty under the law of the land, and is therefore to be utterly disregarded, in pronouncing upon the validity of his certificate and entry. Mr. Ancé had also been examined on the part of the Respondents, as a witness in this cause, to prove the celebration of a marriage. His testimony was objected to, and the objection was reserved for the final hearing or taken *de bene esse.* As the judgment of the court below proceeded upon the ground *actore non probante reus absolvitur,* no ruling was made upon the objection. It is manifest, however, that this evidence was received in gross violation of the *Ordonnance* de Moulins, and that it is inadmissible, being *outre le contenu d'un écrit,* as well as forbidden by the *Ordonnance* already referred to. The evidence of this witness will require comment hereafter ; but, with reference to the celebration in fact of any marriage, it may be adverted to now as exhibiting the legal view entertained by the priest on the subject of marriage. It appears that he undertook to administer an oath to Mr. Scott " qui consistait dans l'engagement de laisser son épouse exercer librement sa religion, et la promesse de laisser élever les enfants dans la religion catholique." The witness says that, after this : " Je procédai à la célébration du mariage, en présence de deux témoins, Monsieur J.-Bte Archambault, notaire, &c. Monsieur Scott *déclara alors qu'il prenait Marie-Marguerite-Maurice Paquet pour sa femme et légitime épouse, et cette dernière fit la même déclaration, en nommant M. Scott.* Dans la célébration d'un mariage, entre catholique et protestant, *le prêtre assiste comme témoin des déclarations des parties qui déclarent se prendre comme époux et épouse.* Monsieur Scott était *assis sur son lit les jambes pendantes hors du lit, conversant avec nous.*" The witness very gravely then

says, " Je crois bien que la *cérémonie* a duré une heure ou deux. En y comprenant le temps qu'il a fallu pour la rédaction du contrat de mariage dont on l'a fait précéder et auquel j'ai signé comme témoin." In another part of his deposition, he says : " Je considérai que de procéder *à la célébration du mariage de M. Scott etait un acte très important et très solennel.* The words *cérémonie*, *célébration* and *très solennel*, are most singularly perverted, when applied to the description of such a scene as that just depicted by the witness : a sick man, with his legs dangling out of his bed, *conversant avec nous, et déclarant qu'il prenait M.-M. Paquet pour sa femme et légitime épouse.* Let us compare this *celebration* with the requirements of the declaration of king Louis XIII, à St-Germain-en-Laye, le 26 novembre 1639 : " Comme les mariages sont le séminaire des Etats, la source et l'origine de la société civile et le fondement des familles qui composent les républiques, qui servent de principe à former leurs polices et dans lesquelles la naturelle révérence des enfans envers leurs parens est le lien de légitime obéissance des sujets envers leur souverain ; aussi les Roys nos prédécesseurs ont jugé digne de leur soin, de faire, des loix de leur ordre public, de leur décence extérieure, de leur honnesteté et de leur dignité. A cet effet, ils ont voulu que les mariages fussent *publiquement célébrés en face de l'Eglise avec toutes les justes solennités et les cérémonies qui ont été prescrites comme essentielles* par les saints Conciles, et par eux déclarées *être non seulement de la nécessité du précepte, mais encore de la nécessité du sacrement.*" Guenois, 1, p. 707. I have come to the conclusion that neither the certificate and entry in the parish register, nor the evidence of Mr. Ancé, prove a marriage in fact between the parties. That there never has been *a conjunctio in matrimonium* by an authorized minister, as required by law, and that no *legal vinculum* ever subsisted between them. On this ground alone, I would be prepared to reverse the judgment of the court below, overruling Respondent's exception of a marriage duly celebrated, and to pronounce for the nullity, as prayed for by Appellant in her declaration. The question which I purpose to take up next, is that raised by the declaration, that, on or about the 15th day of December, 1851, the deceased W. H. Scott "become delirious, and so continued up to the time of his decease ; that he was incapable of entering into any contract, or granting any consent whatever, " at the time of the supposed marriage between him and Dame Paquet. William H. Scott died on the 18 December, 1851, at the age of 52 years and 11 months, having been born on the 13th of January, 1799. He died after the voting for the return of a member of parliament for his county had ceased, and before the proclamation of the member elected. He was the

successful candidate, being reelected. He was not a man of temperate habits, but, on the contrary, addicted to liquor. He kept a shop in the village of St. Eustache, in a house in which he resided with one of his sisters. In another house in the same village, but, on the other side of the river, Marie Marguerite Maurice Paquet, one of Respondents, resided, with her two youngest children, one of whom was idiotic and a cripple. An illegitimate connection had existed between her and Scott for many years, the fruit of which was the birth of five children, four boys and one girl. The eldest boy born in the month of May, 1831, baptized on the 25th September, 1831, as " Henri, *né il y a quatre mois, en cette paroisse, de parens inconnus*," lived with his father as his clerk ; the girl, Caroline by name, was taken from the mother, sent to Appellant, her aunt, residing in Montreal, as soon as she began to speak, and was educated by her, and resided with her until after the death of her father, she was married to Dr. Alfred Nelson, one of Respondents. The deceased, her father, was called in the aunt's family, her uncle William. The boys were brought up as roman catholics, and attended the church services, sitting in the same pew with their mother. The daughter, it is to be necessarily inferred, though not directly proved, was educated as a protestant in the faith of her father. William H. Scott was in the habit of, from time to time, visiting Respondent Paquet at her residence, and their connection was notorious and matter of scandal in the parish. On the 15th December, 1851, Scott who had burned his face, as was supposed by coming into contact with a heated stove, and who was under medical treatment, left his usual residence, in a state of great agitation, in spite of his sister's remonstrances. He was not shod as usual ; his limbs bent under him, and he was supported until he reached the residence of Respondent Paquet. He had been drinking during the election, but, for three days previously to his leaving his house, he had not drunk. On reaching the house of Paquet he lies down on a bed, and every description given of him by all the witnesses examined, connect him with this bed till his death. His family physician was Dr. Benjamin Romilly Jamieson, who says, that in the afternoon of the 15th December, he was called to see him at the place where he kept his store ; he was shewn to him by one of the misses Scott, his sister. Scott was in a state of great mental perturbation. His face was considerably swollen and large vesication was seated over the frontal region ; other small vesications and slight abrasures occupied a portion of his face. His tongue was much furred. He was laboring under erysipelatous inflammation. Dr. Jamieson prescribed for him, and left instructions with miss Scott to heep a very brisk

action on his bowels, by means of the black drought, a medicine. Some short time after this visit, the doctor received a note from Scott himself, expressing surprise at not receiving pills he had promised to send over. The note must have been written under the *influence of great agitation or excitement*, as well from the character of the handwriting as from the nature of the request, the doctor being convinced that he must have received the pills before that time. Dr. Jamieson then concluded as to the real nature of his disease in connection with the local affection of his face, that Scott was booked for *delirium tremens*. He hurried off immediately to see him, and met him on the threshold of his door going out into the street, asked him where he was going, but could get nothing in the shape of a distinct or connected narrative, he spoke incoherently, and peremptorily refusing to yield to a suggestion to go back. The necessity of returning to the house in the state he then was, was urged upon him. *His thoughts were full of anxiety, distress and suspicion*; *he even seemed suspicious of the doctor*, and indifferent to his offers of assistance to convey him were he was going, which the doctor endeavoured to do, seeing that he could not get him to turn back. Physical force was not resorted to, as in such cases it only makes the patient worse. The physician did not consider him in a fit state to leave the house at the time, and would decidedly rather that he had remained, because *a universal tremor occupied the whole muscular system, his movements were performed with anxiety, rapidity and imperfectly, in short, he manifested the whole train of symptoms characteristic of delirium tremens*, setting in with unusual intensity. Dr. Jamieson was perfectly satisfied that *he did not know what he was doing, he seemed to be impelled by an instinct of where he was going, the instinct that animates persons labouring under delirium tremens.* To use the words of Dr. Jamieson, as found in his deposition in the record : " I do not say as a positive fact that I knew secret workings of his mind, but I drew this conclusion from his refusal to listen to my representations as to the injury to which he was exposing himself, coupled with the manifestations of symptoms of *delirium tremens.* He stumbled a number of times, but, by my assistance, he was kept from falling entirely. He went to the house of Defendant Marie-Marguerite-Maurice Paquet. I remained there a very short time. His appearance threw the inmates of the house into a state of alarm and surprise. The Defendant in particular seemed to yield very largely to her feelings and seemed overwhelmed with painful emotions. I have no positive recollection of who were present at the time, besides Defendant, Miss Paquet. They immediately made preparation to make

him comfortable; I left some instructions, and took my leave with a view of devising a mode of treat appropriated to the peculiar exigency of his case, because it was complicated and required a combined or modified mode of treatment. I returned very shortly after the same evening, and it strikes me I remained there the greater part of the night. I cannot say whether I remained the whole of that night. I know that I was there the whole of the night of the seventeenth. As far as my recollection serves me, I remained the greater part of the nights during all the time he was ill; to the best of my recollection, I very seldom left him for any great length of time, either by day or night during his illness. From the nature of the treatment I adopted, I did not expect any improved condition of his mental faculties until the arrival of the period necessary to work out a course of medecines appropriate for *delirium tremens.* As it was necessary to overcome, by preliminary treatment, the inflammatory condition of the face, before employing hypnotics and stimulants, necessary to subdue *delirium tremens;* and the period may have been from twenty-four, forty-eight, or seventy-two hours, according to the circumstances. The more aggravated the complication of the disease, the more time it would be likely to take. During the whole of the night of the fifteenth, he was labouring under a state of mental hallucination. At one time he was defending his mother from imaginary imputation of slander, at another time, devising means of escape from supposed premeditated attacks of imaginary enemies. He smoked occasionally. I endeavoured to engage his mind in conversation on the subject of the election which was then in progress. He would at times answer a question rationally, but without continuity, and would immediately wander off on the subject of his *delirium.* This is the character of *delirium tremens;* there is a gleam of intelligence in the midst of the wreck of the faculties of the mind, and I founded it to be so in his case. There was a peculiar aggravation of the mental aberration of Scott on the night of the sixteenth; and generally there was no marked improvement in his mental capacities up to the time when he awoke from his sleep, some hours before his decease on the eighteenth. As far as my recollection serves me, three nights passed after he entered the Defendant Miss Paquet's house, and before he died, and to the best of my recollection these were the nights of the fifteenth, sixteenth and the seventeenth; although I am not positive as to the days of the month, I am pretty certain as to the number of nights. I noted the number of nights from particular circumstances transpiring each day or night. On the evening preceding the arrival of Dr. Fisher, which I suppose to have been the six-

teenth, the notary and priest were present. On the afternoon of the following day, which I take to have been the seventeenth, Dr. Fisher made his first visit. On the evening of the next day Mr. Scott died. It was not until late on the night of the seventeenth, that the decease procured what may be said to have been his first sleep. Previous to this time he may have dozed for a short time, or have been made to remain in a state of quietude, but he could not have had any sound sleep, as he was not under treatment for *delirium tremens*, but for the alleviation of the inflammatory state of the face, that required a preliminary antiphlogistic treatment, and that of a modified kind. On the morning of the seventeenth, the Defendant, Miss Paquet, enquired of me as to the state of the late Mr. Scott ; I informed her that he was in a dangerous condition, and she appeared surprised that deceased was at all connected with danger, and it appears that she sent for Dr. Fisher without giving me any intimation of it. Dr. Fisher called with me in the afternoon of that day ; we visited Scott together, and consulted as to the mode of treatment to be adopted. He afterwards called at Scott's house on the eighteenth, while I was in attendance ; his second visit was made at my urgent suggestion, in consequence of my having anticipated a fatal termination of the case, from the obstruction interposed by Defendant Paquet exercising the privilege and prerogative of a wife, and preventing me from employing the remedies which I considered necessary for such a case ; this occurred on the eighteenth. After his sleep, Scott got up appearing to be perfectly well, both bodily and mentally ; he sat upon the edge of the bed, and exclaimed while rubbing his eyes : Dr. what has brought you here, have I been sick ? This was the period, in my opinion, to have administered stimulants, to prolong the convalescence, and I had given him about an ounce and a half of brandy. Seeing that it had but a slight effect, I endeavoured to repeat it, but was opposed by Miss Paquet. I then urged the necessity of her immediately calling in another medical man, to relieve me from the responsibility of the case, and Dr. Fisher was sent for. I then represented to her the danger of even waiting for the arrival of Dr. Fisher, and urged upon her to send for Dr. Dorion who was near at hand, stating at the time, if Dr. Fisher was present, he would throw in brandy both by the mouth and by the rectum, as the patient was rapidly passing into the state of collapse. Dr. Dorion arrived ; in the meantime, Scott continued to sink rapidly. What we supposed to be effusion was going on in the brain. I gave Dr. Dorion a short exposition of my views relative to the disease, and the treatment adopted, stating, as my conviction, at the same time, that the patient

would succumb very rapidly, if stimulants were not largely and freely administered. Dr. Dorion shrugged his shoulders, went into the anti-room and smoked his pipe, telling me to do as I liked, that they had (speaking of the Defendants and her relatives), a prejudice against brandy, and to administer something in place of it. I waited anxiously for the arrival of Dr. Fisher, as Dr. Dorion would not assume any share of responsibility in the treatment of the case. Scott was just dying or had just died when Dr. Fisher arrived : the roads being bad and he residing at a distance. My treatment had been interfered with very slightly on the sixteenth, but by persuasion of Dr. Fisher, I was allowed to go on, on the seventeenth ; otherwise he would have been left in the undisturbed management of the case himself. At that time, he agreed with me as to the treatment. Although the disease from the first night, might have been considered one from which Scott might or might not have recovered, still it was of a highly dangerous character, but not necessarily fatal, being a disease from which it was quite possible death would not result. In fact, I consider persons in that disease, aggravated as it was, their life hangs upon a thread, although from our mode of treatment, adopted since eighteen hundred and thirteen, we witness a great many recoveries and a number of deaths, but a larger number of recoveries than deaths, although persons subject to it, if they recover once or twice are generally carried off in the end. I do not mean to state that Scott would certainly have recovered, even by the administration of the stimulants which I wished to give him, viz. the brandy, otherwise I would have poured it into him in spite of all opposition. During the time the *delirium* continued, from the commencement of the deceased up to the time he awoke from his sleep ; on the afternoon of the eighteenth, his actions and conduct were diametrically opposed to those of a person in the enjoyment of his sound senses. His imagination was morbidly excited. At one time, he would crouch under the bed clothes to screen himself from imaginary enemies, and, at another, he would put on his clothes to go out and address electors ; on one occasion, in particular, in spite of all our endeavours to the contrary, he dressed very late at night, muffled himself well up, because such patients are very particular about the state of their feelings. Fearing that any degree of physical coercion would only exasperate him, I determined to leave him to his inclinations, as his project was neither dangerous to himself nor to others. He went to the church door in the village, reached there, he imagined that the conspirators were flying before him in all directions, pointing out to us the direction in which they were running ; of course he merely pointed to where

there was nothing at all. He changed his mind, because satisfied that the conspirators had dispersed and we got him back to the house. This must have been near midnight, perhaps past it; the villagers were all in bed. This occurred, as well as I can recollect, on the first of the second night of his illness. He continued during the whole of the time up to the period when he awoke from his sleep, to manifest a condition of mental aberration, and to commit extravagances such as I have mentioned, always excepting momentary intervals of apparent lucidity. This is the character of the decease; in the height of their *delirium*, patients will answer questions rationally and pertinently, and immediately after concentrating their thought upon the creations of their imagination. On the night of the sixteenth, after the notary and priest had gone out, he answered rationally a question put to him by me. The question was put through the Defendant, Miss Paquet, and I then entered the room myself; and he was sitting on the edge of the bed; when he commenced a disconnected and verbose statement of private affairs, I attempted to throw his thoughts into other channels, knowing that under circumstances, he would not have made such communications to me; observing through the course of his narrative: What could I do ? I was in a scrape; and imagining his brother James, in person before him, although he was not there at all, he appeared to writhe most painfully under the imaginary reproaches of his brother James, saying: " Dear James, do not reproach me for I was in a scrape." The imaginary reproaches seemed to him exceedingly painful. By imperceptible degrees he continued to become more violent and intractable in his motions and language; a minute afterwards he fancied he saw a body of armed men trying to break the window. He rose up with a good deal of impetuosity and determination to oppose their entry, but he soon yielded to a sense of fear, cowardice being a prominent feature of the disease, and suffered insupportable apprehensions of impending dangers; then followed upon this the steamboat conspiracy. He imagined himself aboard of a steamboat, that he was envelopped in a mist of fresh conspiracies. To see to what extent fear operated upon his mental faculties, I asked how much he would give to get clear of these conspirators; he stated that he would give a large sum of money, stating in what bank it was deposited and instructed his son, William, to touch said sum of money, and pay it the conspirators. On the second day of my attendance on Scott, I attended during the greater part of the day, and left to dine at my boarding-house about half-past one or two. When I returned it was towards evening; the days being short, the candles were lighted; I had been absent two or three hours, more or less. On my return I found his

private room, viz. his bed-room occupied by sundry persons. I refused to intrude into the room at that particular moment, that is, I declined to enter the room, from my own movement or sense of delicacy. Very few minutes afterwards the parties made preparations to leave. I recognized the voice of Messire Ancé, the priest, of M. Archambault, the notary, and one Mr. Féré, passing congratulations on what had taken place. I anticipated that something important had been transacted, and put a question to Scott through Defendant, Miss Paquet, before I entered the room. The question that I put was to ask who was the physician that attended him, and he replied that it was Dr. Jamieson ; I heard the reply myself. This was the question that I have referred to as having been answered rationally and pertinently by Scott. I then entered the room immediately, with the view of ascertaining the precise state of his mind, and found him *in statu quo* that is in the state I had left him or rather worse from the appearance of his tongue. There was a marked diminution in the inflammatory condition of the face and a progress of development of that irritation of the brain peculiar to *delirium tremens*. He was more violent and had less control of his mental faculties. It was at this time that he commenced the disjointed statement of his private affairs, and went on with the extravagances I have already mentioned as having taken place on the evening of the sixteenth. So far from my considering that he was at the time fit for the transaction of business, I would have deemed it unwise and culpable to have entrusted to his protection the safety of his own person for a single hour. I, as a physician, consider that he was at the time most decidedly unfit for the transaction of business. From my second visit, that is on the first evening of my attendance, the day I believe to have been the fifteenth up to the time he awoke from his sleep, on the day of his death, I consider him totally incapacitated from the state of his mind for the transaction of business. He was in a condition of absolute mental debility, peculiarly susceptible to the operation of any undue influence ; this was tested by his willingness afterwards to sign large promissory notes and give sums of money for the suppression of conspiracies, which he imagined to exist against him. His feelings, or fears and cowardice were much excited; he laboured under great apprehensions of impending dangers, so much so, that I believe, to have been relieved from which, he would have readily parted which any amount of wealth, or consented to any proposition made to him not involving destruction or bodily affliction to his own person. I had not the slightest knowledge at the time of what had passed, or what the business of the priest and notary was on the occasion of their visit. I had no communication of it myself, and I believe the people generally, except the immediate

agents in the transaction, were in profound ignorance of it. When the party broke up and passed congratulations upon what had taken place, I had then suspicion or conjectured what had taken place. The following day a report spread around the village that he had been married the preceding day in the afternoon, which report confirmed my suspicions: there was one of the Misses Scott residing in the village at the time; I cannot distinguish them by name, but I believe it was Barbara. It was of the effects of *delirium tremens* that Mr. Scott died; I consider that the inflammation of the face was subdued." Upon his cross-examination he says: " When I spoke as I have spoken of the late Mr. Scott, as being in a condition, on the day of the sixteenth, to be easily influenced, it was not my intention to convey the idea that improper agencies had or had not been brought to bear upon the completion of the transaction that had taken place on the afternoon of the sixteenth, but from the way in which I saw attempts made to excite his hopes and fears on another subject, I have no reason to reject the supposition that he was unduly influenced; the probability is that he was. When I speak of attempts made to excite his hopes and fears on another subject (religion), I refer to a conversation that I heard between Messire Ancé and Dr. Dorion, on the day of the eighteenth, in the house where the deceased died, when I heard Messire Ancé mentioning that he had proclaimed to Scott the important proposition: *Hors de l'Eglise, point de salut; that was his hour for salvation, and that few hours more might be too late.* Notwithstanding that I have reason to believe that Scott died a protestant, from the fact in particular that he was buried in the protestant cemetery. Although I was in the village, I never heard, at the time, that Scott had consented to become a roman catholic. When I met Scott on the threshold of his house, I endeavoured as much as I could to induce him to return back to the house from whence he came, but I could not persuade him to do so, so much he appeared desirous of going somewhere. So soon as he turned the corner of the street leading to the house of the Defendant, Miss Paquet, I saw that it was there he desired so much to go. When I spoke of lucid intervals in my examination in chief, I did not mean to speak of long intervals, or that prolonged duration of lucidity that marks monomania, I alluded to those transitory gleams of intelligence that mark the progress of the disorder, of which he was taken ill decidedly on the fifteenth,and which continued increasing until he fell asleep on the night of the seventeenth. On the eighteen, after a sound sleep, he had, I should say, two or three hours of a better condition of mind during which time he had a correct knowledge of what was going on around him. He asked me what had brought me, or what I was there for; have I been sick ? (not knowing what

had occurred before apparently). I told him that he had been slightly indisposed, but that he would soon be well. It was my sincere belief that he was convalescent then. From the beginning of the disease, I expected that he would recover from the disease; yet, at the same time, I intimated to Miss Paquet the certainty of its being connected with danger, if my prescription of the seventeenth took no effect. On the first, second and third day, I did not look upon the disease as a decidedly mortal one. I never conveyed to Scott any intelligence of the nature of his complaint, nor did I ever convey to him the idea that he was or might be in danger; that would have aggravated the disorder. During the disease of Scott, he had that knowledge of surrounding objects, as is generally possessed by persons labouring under *delirium tremens.* On the evenings of the fifteenth and of the sixteenth, he seemed to enjoy his pipe tolerably well. On the sixteenth and seventeenth I remained the most part of the time near him, and now recall to my recollection that I passed also the night of the sixteenth with him. The symptoms of an increase of a disease were apparent on the sixteenth and seventeenth, from the state of his body, the muscular tremor pervading the whole of his body, the soft and comprehensible pulse, the moist and creamy tongue, and from the state of his mind, his apprehensions being more vivid, his movements being violent and unmanageable, and the fanciful illusions of his imagination more extravagant. I thought proper at once to treat immediately the local disease, the erysipelas, and to wait its subjugation before I commenced treating him for *delirium tremens. Question*: Is not the shortness of lucid intervals on the sixteenth and the seventeenth day, attributable in part to the treatment that you thought proper to follow in attempting to cure first the erysipelas, delaying the treatment of *delirium tremens* until the first object was obtained? *Answer*: By no means. I recognized the short lucid intervals, as an effect of, and additional symptom of *delirium tremens* in its well developped character, I do not believe that had I thought possible that *delirium tremens* could have been treated immediately, that his lucid intervals would have been of longer duration. The last symptoms of the disease of which Scott died, were debility of the brain, occasioned by exhaustion of nervous powers. It is not of frequent occurrence that erysipelas is a frequent attendant of *delirium tremens;* in this particular instance, it was a perfectly local disease. In the particular instance of Scott, *delirium tremens* was in no way connected with monomania, although it may have consisted of a series of acts having analogy with monomania. The imagination of Scott was distorted on every subject, although he took particular care of his feelings, and would light and smoke

his pipe. He was raving very much about the last election on the fifteenth and on the sixteenth also, when he wanted positively to go out to address the electors, but not afterwards about the election. I should believe that in a case of *delirium tremens* old affections and old impressions do not occupy the mind of the diseased, but only what has immediately surrounded him or occupied him, and I judge of this from what I have seen in my practice." Dr. Fisher, the other attending physician for the deceased, on his examinations, says: — "I remember in the month of December, 1851, as nearly as I can recollect, or the sixteenth or seventeenth of December, 1851, I was called in to see the late William Scott who was at the time ill of delirium tremens. I was called in consultation with Dr. Jamieson who was then attending him. I understood I was called at the instance of the family, though I never inquired who sent for me—it was between four and five o'clock when I arrived—it was just getting dusk — I found him in bed, examined his pulse and considered him in a dangerous state; he was delirious, his face was swollen and he had a scar upon it. I proposed to give him medicine to induce sleep, laudanum with brandy, as we call it in our treatment brandy punch. It seems that he had not previously slept, and this was given to calm his excitement and to induce sleep. The Defendant, Miss Paquet, objected to his getting brandy at the time, but I overruled her objections on the ground that I considered it necessary, and left with the understanding that this treatment was to be followed, agreeing with Dr. Jamieson as regards the treatment. When I saw Scott he was in bed. I considered him incapable of talking rationally, and put a few questions to him. He was not in my opinion in a fit state to transact any business, so much so that I consider if he had committed murder at the time, he would not have been responsible for it; his mind was in an unsound state when I saw him. The symptoms appeared to be those of a very bad case of *delirium tremens*. I considered his case a very bad case, that is to say a very dangerous case. I was guided to a certain extent in the treatment that I proposed by Dr. Jamieson's report of the length of time he had been ill, the treatment he had followed, and the fact of my having understood that he had not previously slept. It was in the house where the said Miss Paquet lives, and not in his own house that I found Scott; his eldest son (that is William) was there, Miss Paquet was there, some servants, and there might have been others whom I do not remember, but I remember seeing the priest there. I was sent for again the next day, but when I arrived he was dead; after a patient wakes from sleep, it depends much upon the opinion of the

attending physician as to the state of the patient in this disease, how long stimulants should be continued. I would not approve of stopping stimulants at once; had it been my case I would have continued it. I heard nothing about the marriage on the occasion of either of these visits, although I had occasion to speak to Miss Paquet, the priest and others present; none of Mr. Scott's sisters nor his brothers were present on the occasion of my visits. I heard of the marriage afterwards, and I was at the time surprised that he should have got married in that state. I did not remark it to any one, but was struck with it myself. When I saw him he was not under the influence of fear. The character of the disease is the seeing of visions, being under the apprehension that people are coming to kill or rob him. I consider that the said late William Scott died of the disease of *delirium tremens*, under which he laboured when I saw him." On his cross-examination he says: "I am not aware whether Scott ever before had an attack of *delirium tremens*. I have known him perfectly well, even intimately, previous to his death for a number of years; he was a man of very quick temper, abrupt in his mode of speaking and peremptory generally in his language. I had two brothers in his shop in St. Eustache; both are now absent from the country. When I visited Scott, the day previous to his death, I advised that medicine be immediately given in order to produce rest. From the conversation that I had then with Dr. Jamieson, I learnt that he had not followed previously the mode of treatment that I then suggested and ordered. Dr. Jamieson told me that he had only given purgatives and local treatment for the subjugation of the inflammation of the face and of the eyes; these are the medicines that he told me he had given to suit the symptoms of the patient. When I saw Scott, I thought it was a very bad case, and doubted whether he would recover. From what Dr. Jamieson told me, I do not know whether it would have been necessary or proper to administer the treatment I suggested previously or at the beginning of the disease." The medical evidence establishes beyond doubt, that the disease of which Scott died was *delirium tremens*, yet Respondents, by their exception, have pleaded *que Scott était sain d'esprit et d'entendement, lors du mariage, et du contrat de mariage qui* d'entendement, lors du mariage, et du contrat de mariage qui l'a précédé, et *qu'il a continué de l'être depuis jusqu'à sa mort*. The judgment of the court below assigns as the reasons for the dismissal of Appellant's action, that "she has "failed to establish by evidence the material allegations of "her declaration, and more especially that Scott was at the "time of contracting marriage with Defendant Paquet, on the

"16th day of December, 1851, delirious or otherwise of unsound mind and understanding, or that said marriage was "so contracted by him in the immediate prospect or at the "period of death, *à l'extrémité de la vie.*" It is to be noticed that no medical testimony whatever was adduced by Respondents, to meet that of the two physicians who attended the deceased. The learned judge, however, who delivered the Judgment in the court below, is reported to have said: "Dr. Jamieson states as a scientific fact, that the disease never leaves the patients until it leaves them finally, that is, there may be times at which it is more intense than at others, but the patient is never perfectly sane." If the case turned only on this evidence of the witness, *the court would have no doubt;* but Defendants' evidence, on the other side, *is conclusive,* unless indeed we take the opinion of Dr. Jamieson that there can be no intervals of sanity. *We find the same opinion indeed in the book sent us by Plaintiff, but it is not supported by any authority.* It is the opinion of the court *that there are cases, and this is one of them, when the person afflicted with the disease is at times in full possession of his faculties. The testimony of Messire Ancé on this point is conclusive !)* The learned judge seems to have put the evidence of Dr. Fisher entirely to one side, notwithstanding the important statement of opinion, "I heard of the marriage afterwards, and *I was at the time surprised that he should have got married in that state.*" The medical testimony appears to me, to have been most improperly slighted bw the court below, when, being uncontradicted by professional witnesses, on the other side, it was entitled to the greatest weight. The books cited on the behalf of Appellant tully support the doctrine stated by Dr. Jamieson, and I do not distinctly comprehend what other authority the court below could have desired. The point was one of medical jurisprudence; if, by authority, the learned judge meant the decision of a court of justice, that could only proceed upon the medical testimony of experts, upon the principle *cuilibet in arte suâ credendum est.* As to the medico-legal opinion of the court below, I say it, with respect (yet it seems to have been hazarded without anything to warrant it): it would appear to me that in enunciating the proposition," that there are cases where the person afflicted with this disease, is at time in full possession of his faculties," reference should have been made to these cases. No book is cited in support of this new opinion, and it seems strange to say that a man may be laboring under delirium, and yet at the same time be in full possession of his faculties. I cannot accept as a *canon* the opinion of the court below, upon this point, nor am I the more disposed to do so, because it is so authoritatively laid down.

Still less can I approve of the statement, that *the testimony of Messire Ancé on this point is conclusive.* It appears to me that, in comparison with the medical testimony, that of Mr. Ancé should weigh little in the balance. It is true that this witness lays claims to the possession of a little medical knowledge, but if his opinion is to be taken, he concurs with the physicians in stating that the disease was *delirium tremens.* In answer to the question " Pouvez-vous dire, oui ou non, si c'était la maladie (*delirium tremens*) qu'il avait pendant quelques jours avant sa mort," he says : " Si ce n'était pas elle, elle y était pour quelque chose, selon mon opinion." He is asked : " Pourquoi le pensez-vous ? " His answer is : " C'était ce que les docteurs pensaient et le Dr. Jamieson était d'opinion que si on lui avait donné de la boisson, il aurait recouvré la santé." Trouvez-vous cette opinion raisonnable ? Answer: "Selon mes petites connaissances, je le pensais dans le temps, tout a dépendu de la manière de le soigner, car je ne le croyais pas dans un état pour mourir." To the question " Avez-vous toujours été de l'opinion que le *delirium tremens* entrait pour quelque chose dans la maladie ? " the answer is," d'après ce qu'avaient manifesté les docteurs j'eus cette opinion. J'ai connu l'opinion du docteur seulement quelque temps avant sa mort." If the testimony of Mr. Ancé is to be opposed to that of the physicians, before treating it as conclusive, it is proper to enquire how they stand respectively as to the bias. On the one side there can be no leaning, nothing which it interests the witness to support. On the other, the proceeding of the witness is impeached, and he must seek to vindicate himself from the obloquy of witnessing and sanctioning by his presence, fraud and surprise, practised upon a man in a weak state of mind and body both. Is the mere opinion then of Mr. Ancé, under these circumstances, to be considered conclusive, as it was by the court below, and that of the physicians, rejected ? Certainly not, and, in my opinion, upon this point, there is in the judgment complained of manifest error. If from opinion, we go to the facts deposed to by this witness, there are some which were deserving of someting more than passing notice. I am dissatisfied with the judgment again, from the curt manner in which it disposes of the question of fact, without entering into a detailed statement of the evidence, in case of great delicacy, which loudly called for it. I feel myself constrained to advert to some important statements made by this witness. And first, as to his primary interview with the deceased, he says," en arrivant M. Scott, que je trouvai *sur son* lit *souffrant,* me dit, qu'il venait *d'avoir une scène chez lui avec sa sœur,* et m'ajouta, qu'il me faisait venir pour le marier avec la Défenderesse, en

la *désignant de la main* et l'appelant sa femme." On the cross-examination, he says: "Mr. Scott me dit qu'il me faisait appeler pour le marier avec la personne qu'il montrait de sa main, et qui était M.-M.-M. Paquet, disant c'est ma femme, c'est ma femme, répétant l'expression deux ou trois fois, il me parut souffrant, et il me parut un peu exalté, en me parlant d'une scène qui avait eu lieu dans sa maison, ce n'était pas dans la maison où il était alors, mais dans la maison où était sa sœur." "Je restai convaincu d'après ce qu'il me dit, qu'on lui avait fait quelque violence dans sa maison, où était alors sa sœur." The *scene*, was the effort made by his sister and Dr. Jamieson, to induce him to remain at home and not to venture out, into the December air, in his state of health. It was a delusion on his part, as stated by Dr. Jamieson, he was excited, *un peu exalté*. Then comes the movement of the hand, to indicate the person, instead of naming her, and the rapidity and imperfect enunciation of his wishes, the repetition of ma femme, ma femme, all symptoms of delirium tremens as stated by Dr. Jamieson. When the dispensation of marriage banns is mentioned "cela parut *contrarier* monsieur Scott, qui désirait en finir, et il me demanda d'accomplir cet *acte* le plus tôt possible." A sane man must have known that a marriage license of some kind was requisite, and the precipitation manifested is another indication of the state of the mind. Le lendemain, le 17 (the day following supposed marriage), the witness says: "Je suis allé voir monsieur Scott, je ne pus lui parler, l'on me dit qu'il avait *besoin de repos*, qu'il *sommeillait et que d'après les instructions du médecin on ne devait pas le déranger*. Je causai quelques minutes avec madame Scott, qui m'avait mentionné les instructions du médecin. Le jeudi, jour de sa mort, le 18 décembre, je suis allé le voir de mon propre mouvement, c'était vers 2 heures et demie ou 3 heures de l'après-midi. Je fus bien surpris de le trouver dans un état aussi alarmant quant à la maladie; son fils était sur le lit à côté de lui, pour l'aider à cracher, et tâcher de le soulever, M. Scott étant alors dans un état de coma." This corroborates the statement of Dr. Jamieson, instead of contradicting it. To come now to the precise time of signing the marriage contract, and the entry in the register, and to the attending circumstances. *It was for Respondents to have proved that there was then a lucid interval in the disease*, during which the deceased had a disposing mind. In case of insanity, it is exceedingly difficult to discover with any approach to certainty, an oasis in the desert of the thoughts. Minute and close observation by experienced persons might aid in the discovery. Let it now be asked, had Mr. Ancé the necessary requisites for the performance of an operation so delicate? I do not believe that he had. The work must be

one of time; the subtlety of the disease baffles, for the most part, every attempt to define the limit between disordered intellect, and the sane and disposing mind. What were the opportunities afforded to Mr. Ancé for the purpose of this investigation? He saw the deceased only twice in his life: about an hour the first time; as to the second "il pouvait être quatre heures et demie ou cinq heures lorsque je suis entré dans la maison, et pouvait être 6 heures ou 7 heures lorsque je repartis." This is very indefinite at the best, but let us enquire how the time was employed. Mr. Ancé is asked: Avez-vous eu une longue conversation avec Scott? Answer: "Le temps fut employé à rédiger les actes, et à procéder à la cérémonie, *tout le temps fut employé à cela, Scott n'eut pas d'intervalle pour parler d'autre chose.* Il était assis sur son lit, les jambes pendantes au dehors de son lit. Quand je partis il était dans la même attitude, sans marquer aucune faiblesse." In the examination in chief the witness had said, "conversant avec nous. Q.—Est-ce ce jour-là que vous lui avez parlé de la religion catholique? R.— La veille et ce jour-là, quand il fut question de la nature du serment exigé pour marier protestant et catholique? Q.—Quand est-ce qu'il vous a donné l'impression qu'il voudrait se faire catholique? R.—Les deux fois, mais surtout après la célébration du mariage, lorsque resté seul avec lui il m'invita à venir le voir et qu'on causerait ensemble. Q.—Combien de temps après cela avez-vous quitté la maison? R.—Cela termina ma conversation avec lui, lui promettant de revenir le voir le lendemain, *si mes occupations me le permettaient ou quelques jours après.* In the examination in chief he had said: "D'après ce qu'il m'avait dit l'impression en est restée qu'il voulait se faire catholique. Quand même il n'aurait pas été malade, je serais allé le voir le lendemain, parce que je devais y aller *non par suite de la maladie, mais pour lui parler de religion.*" On the cross-examination he says to the question. Q.—Quand vous avez parlé à feu M. Scott au sujet de la religion, vous souvenez-vous d'aucune chose qui parût le frapper en particulier? et si aucune de vos remarques parut le frapper? R.—Rien en particulier. Q.—Avez-vous expliqué à M. Scott la signification de ce dictum de l'Eglise catholique: *Hors de l'Eglise point de salut.* R.—Il ne fut nullement question de cela et la conversation n'alla pas jusque-là. Q.—A-t-il paru avoir aucune inquiétude sur l'état de son âme, en considération de la vie qu'il avait menée. R.—Il ne me donna pas à comprendre que ce fut le cas. When asked "Le contrat de mariage était-il réglé avant ou après votre arrivée?" He says: "Je signai au contrat comme témoin. Il ne s'est pas fait ni avant ni après, puisque j'ai signé, le clerc de M. Archambault l'a écrit en ma présence." Q.—Y

eut-il en votre présence quelque discussion sur les conditions du contrat ? R.—Ce fut M. Scott qui dicta les conditions du contrat selon ses volontés. Q.—Y avait-il quelqu'autre personne qui a pris part dans la discussion ? R.—Je ne vis pas qu'il y eut discussion pour les conditions du contrat. M. Scott exprimait sa volonté et le clerc écrivait sous sa dictée. Je n'ai pas souvenance que personne ait suggéré des conditions à M. Scott, quand *il me parut agir selon la justice distributive.* In the examination in chief he had said : " Je me rappelle que le *notaire Archambault suggéra à M. Scott de faire un testament*, mais M. Scott insista à ce que ce fût un contrat de mariage, mais je ne me rappelle pas qu'il ait donné des raisons pour en agir ainsi. Le 16, le jour du mariage, je l'ai trouvé beaucoup mieux qu'il n'était la veille. Je n'ai aucunement remarqué que M. Scott subissait aucunement des obsessions de qui que ce soit dans cette occasion." If the testimony of the notary Archambault, a witness on the part of Respondents be true, and there is no reason to disbelieve the important fact stated by him, which will now be adverted to, Messire Ancé's powers of observation are not great, or his recollection must be bad. The notary says in his deposition : " J'ai ouï dire après la mort de M. Scott, que l'on avait dit qu'il avait le *delirium tremens*, mais je ne l'ai pas pensé, parce que pendant les deux heures que je l'ai vu, je l'ai trouvé parfaitement bien, *si ce n'est pendant que j'étais là, sans me rappeler si c'était avant ou après la célébratian du mariage, il faisait un grand vent qui sifflait dans le contrevent, et M. Scott prêta l'oreille et dit :* " Les voilà." Une personne,sans me rappeler qui, lui dit : " *Ecoutez*, M. Scott c'est le vent." En effet, M. Scott prêta l'oreille et dit : " En effet je suis convaincu que c'est le vent." Personne ne lui a demandé qui il pensait pouvait venir. Il ne me paraissait pas agité, excepté quand il a dit : " Les voilà." Je n'ai remarqué rien autre chose d'étrange dans sa conduite, pendant le temps que j'étais là. Je n'ai jamais vu M. Scott tomber en état d'excitation après avoir cessé entièrement de prendre des liqueurs fortes, seulement ce que j'ai observé, c'est qu'après avoir bu, il perdait la mémoire. A more conclusive proof than this of *delirium tremens* as described in the books and after them by Dr. Jamieson in his evidence, at the very time of the supposed marriage and supposed lucid interval, could not be desired. Again the fact sworn to by Mr. Ancé himself : " Je fus le dernier à partir, ayant resté après le départ du notaire et des témoins qui furent conduits en voiture, M. Scott me voyant partir seul, me dit: *Prenez-garde à vous,que personne ne vous attaque en route, je lui répondis, que je ne craignais pas, que j'étais habitué d'aller seul*, is another proof of the feeling of apprehension, anxiety and fear, characteristic of this description of insanity. It

was only on the 18th, after a sound sleep that the deceased, to use Dr. Jamieson's words "had a correct knowledge of what was going on around him. He asked me what brought me, or what I was *there* for, have I been sick, not knowing what had occurred before apparently." With the proof of his ravings previously, from the moment of his departure from his own house to go to the residence of Respondent Paquet, I fully concur with Dr. Fisher when he says: " He was not in my opinion in a fit state to transact any business, so much so that I consider if he had committed murder at the time, he would not have been responsible for it. The symptoms appeared to be those of a very bad case of *delirium tremens*. Witnesses have been examined by the Respondents, to prove contradictory statements of opinion made by Dr. Jamieson. This testimony I wholly reject. Before adducing it, it was incumbent on Respondents, in common justice, to have asked Dr. Jamieson, if he had said what is imputed to him, and to have afforded him an opportunity of explanation. I say it was incumbent, because, the rule of evidence, according to the english system, upon this point in my opinion is the only rule in Lower Canada. No authority from the french system can be had, upon this matter. The *vivâ voce* public examination of witnesses, in open court, and their cross-examination were unknown in our tribunals prior to the conquest; they were introduced into the country, upon the change in the system of judicature, which then occurred. The old enquête was a secret and private examination of the witnesses, from which the parties and their counsel were carefully excluded, just as obtains in the Court of Admiralty, and the other courts regulated by the civil law. But, even under the old system, to impeach the testimony of a witness or to contradict it, required specific *reproches*, which have not been made, and which have never, to my knowledge, been made in our courts, the fact being that with open examination and cross-examination they are not required. But medical men, in answer to questions respecting the state of their patients, habitually resort to evasions, and their *bulletins* intelligible among themselves, are more calculated to conceal than to declare the real facts of the case. If the deceased had been of sound mind, at the time, of what the witnesses persist in calling the ceremony of marriage, it is singular that the physician in attendance upon the sick man, and who was his regular family physician, was not asked to witness it, or the marriage contract, although a stranger like Mr. Ancé was called up contrary to usage, to witness that contract. Notwithstanding the efforts made to discredit the evidence of Dr. Jamieson, I place perfect reliance upon it, and consider it highly creditable to his professional attainments.

If reference now be had to the marriage contract, il will be found to exhibit internal proof of singularity, quite consistent with the condition of mind of the deceased. It contains a disposition of an unusual character, more testamentary than *contractuel*, " le dit sieur futur époux, la met et subroge en tous ses droits, noms, raisons et actions, *toutes fois sur la perception de l'indemnité, que pourra recevoir la dite demoiselle, future épouse, le dit sieur futur époux intime à la dite demoiselle future épouse, qu'elle en fît le partage et s'en désaisisse en pleine propriété aux demoiselles Anne et Jane Scott, sœurs du dit sieur futur et aussi demoiselle Caroline Scott, fille du dit sieur, futur époux, et ce pour chacune un tiers dans la dite indemnité.*" The bride was to receive this indemnity only to hand it over to three other parties. Again the covenant " quant à la généralité des autres biens meubles et immeubles que peut avoir et qu'aura le dit sieur futur époux à son décès, ils lui sortiront nature de *propre à lui, aux siens et à ceux de son estoc et ligne* " is strange when it is considered, that his own son William Scott signs the contract and his daughter is mentioned in the same instrument. What was meant then by *estoc et ligne* et aux *siens* ? The singularity of Mr. Ancé being made to sign this contract has already been noticed, it only remains to advert to the circumstances that the notary, Archambault, contrary to the provisions of the statute of the 13 and 14 Victoria, cap. 39, sections 7 and 8, has not mentioned the number of the instrument, so as to shew that it was executed in a continued and unbroken series, and to enable reference being made to the index or *répertoire* of the instruments executed by him in his official capacity, and remaining of record with him as a public notary, and that the christian name of Mr. Ancé is not given; evidently the document was drawn up in a hurry and in a very slovenly way. It has been argued on behalf of Respondents that this marriage so called was a reasonable act on the part of the deceased, was consistent with former acts of his, when perfectly sane and in health, and was only carrying out former promises often repeated. Evidence was adduced in support of the plea " que depuis un très grand nombre d'années Scott et la dite dame Paquet *vivaient maritalement comme mari et femme sous la promesse* souvent alors donnée à cette dernière et souvent réitérée depuis par Scott, qu'il épouserait légitimement Mme Paquet. Que cette promesse et son intention de la mettre à exécution furent manifestées et annoncées par lui en différents temps devant ses parents et ses amis, et particulièrement devant et à la connaissance de la Demanderesse en cette cause. Qu'il y a près de deux ans, Scott désirant mettre à exécution la promesse qu'il avait faite à la dite dame, de l'épouser légitimement, du consentement

de cette dernière fit demander un prêtre de la religion catholique romaine pour le marier légitimement avec la dite dame Paquet, qu'à cette fin plusieurs amis du dit feu Scott, se trouvaient assemblés dans la maison où vivait dame Paquet, avec leurs enfants, pour être témoin du dit mariage, que le dit feu Scott et dame Paquet, s'y trouvaient en habit de fête prêts à contracter un mariage légitime devant *un prêtre de la religion catholique romaine duement autorisé à cette fin*, lorsque ce dernier crut de son devoir d'insister auprès de Scott, qui était protestant, à ce qu'il promît *sous serment*, de laisser élever ses enfants dans la religion catholique, ce à quoi se refusa positivement Scott, disant qu'il ne voulait pas faire tel serment, que ce n'était pas néanmoins par hostilité contre les catholiques, puisque ses enfants avaient été élevés catholiques, mais qu'étant protestant il ne voulait pas faire telle promesse qui n'était pas d'ailleurs nécessaire suivant lui. Que Scott répéta alors plusieurs fois devant le prêtre catholique alors présent, et ses amis alors présents, que dame Paquet était sa femme, et qu'il était son mari manifestant toute sa volonté de la regarder et de la tenir pour sa femme et légitime épouse, *la traitant avec tous les égards dus à une épouse.*" Not to notice the proof by Respondents themselves, that the connection between these parties was a public scandal, and the Respondent Paquet was notoriously a kept mistress or concubine, living not *maritalement*, but apart from Scott, her keeper, this plea in point of law is insufficiant, upon the very face of it. It has not been demurred to, it is true, but must be rejected as the law has expressly prohibited all proof of it. The ordinance of the kings of France, which I began by citing, and the authority of Danty are positive on the point. Under the old law of France, which we are bound to follow, it was the duty of the Judge *ex officio* to reject parol testimony, although not objected to by the parties,and to carry out the prohibition ordained by the Legislature. That portion of the plea also which mentions the oath as a condition must be rejected, as such an oath is manifestly unlawful upon the very face of it, and priest or ministers of religion have no authority in Lower Canada to administer oaths to layman, yet as the proof adduced by the Respondents on this head serves more fully to explain their legal pretensions as to the formation of the marriage tie between protestant and roman catholic, I cannot suffer it to pass by unnoticed. It will be remembered that Scott died in December, 1851, and is supposed to have contracted matrimony two days before his death, the transaction which is relied upon in support of the Respondent's claims dates so far back as to July, 1845, or upwards of six years before, the chief witness who speaks to it is le révérend père Félix Martin, supérieur du collège Ste-Marie, résidant

à Montréal, he says : " Dans le cours de juillet 1845, en autant que je puis me rappeler, me trouvant à St Eustache, le curé de St-Eustache me dit que Scott voulait se marier avec Dame Paquet, et que tout était préparé, et il me donna ses pouvoirs pour le marier me disant que Scott désirait que ce fût moi qui fît ce mariage. Une ou deux des personnes qui devaient être témoins vinrent me trouver pour convenir de l'heure qui fut fixée vers neuf heures du soir. A cette heure ils vinrent me prendre, et nous nous rendîmes à la maison que l'on me dit être celle de Dame Paquet. Je trouvai dans le salon trois ou quatre personnes venues comme témoins, me dit-on. Une petite table couverte d'un tapis avec deux chandeliers allumés était au fond du salon. Il y avait papier, plumes et encre, et je crois une bible et pas autre chose. M. Féré, Scott et Dame Paquet étaient en habits de visite, et plus proprement que de coutume. Les enfants étaient dans une chambre voisine, et se laissaient voir par la porte qu'ils entrouvraient. Je lui dis tout d'abord, qu'avant de procéder au mariage, il devait promettre, sous serment, d'élever ou faire élever ses enfants dans la religion catholique, et cette proposition changea tout d'un coup la réception que m'avait faite Scott, et il protesta qu'il ne ferait jamais ce serment, mais qu'il était si peu opposé à ce que les enfants fussent élevés dans la religion catholique, qu'ils l'étaient déjà. Scott s'exalta beaucoup, parla beaucoup et dit : " Au reste, je n'ai pas besoin de tout cela, tu es ma femme, je t'ai choisie pour ma femme," répétant l'expression plusieurs fois, et ce, en s'adressant à Dame Paquet. Il lui demanda encore : " Veux-tu que je sois ton mari ", ce qu'il répéta aussi. Dans le moment personne ne lui adressa la parole, et moi-même je ne lui dis rien, et il allait et venait dans la chambre comme un homme qui est blessé et aussi exalté, mais quand j'arrivai il n'était point exalté ou irrité. Madame Paquet était au fond de la salle debout pendant toute cette scène, et paraissait comme interdite et déconcertée, et quoique Scott ait été jusqu'à elle pour obtenir une réponse à ses questions, *je n'en ai pas entendu.* Ne pouvant pas procéder licitement au mariage sans que Scott vînt à se rendre à l'exigence dont j'ai parlé, je me retirai en m'excusant. Si ce n'avait été cette exigence là, Scott était décidé à se marier avec Dame Paquet et j'avais le droit, et j'aurais procédé au mariage si elle avait exprimé verbalement son consentement devant les témoins. J'avais vu plusieurs fois avant cette séance, Dame Paquet, et elle m'avait manifesté sa volonté et son désir ardent de se marier avec Scott, et je ne puis attribuer son silence dans l'occasion présente qu'à sa timidité, car elle n'a pas parlé du tout. Cette timidité, ne provenait, à mes yeux, que de l'état d'exaltation avec lequel Scott lui parlait. Une ou deux heures après mon retour, un ou deux témoins vinrent me

trouver, me disant que les parties étaient encore en présence, et me demandant s'il n'était pas possible de modifier quelque chose dans l'exigence sus-mentionnée, et je répondis que ma ligne de conduite m'avait été tracée, et que ce changement ne dépendait pas de moi, et ils se retirèrent. Ces mêmes personnes me répétèrent que Scott consentirait à tout, si on retirait cette condition. Je dis que, si Madame Paquet avait donné son consentement, et que je l'eusse entendue le donner, j'avais le droit de faire l'acte de mariage, et l'on aurait pu m'y forcer, avant même que Scott eût consenti à la condition demandée, et dans ce cas le mariage aurait été valide et licite. Lorsque Scott m'a refusé la promesse demandée, le mariage eût été valide mais non licite de ma part." On his cross-examination, when asked: "Vous fallait-il une dispense pour marier Scott, lorsque vous lui avez rendu la seconde visite ? The answer is: *Cette dispense était l'affaire du curé et non la mienne, je n'ai pas vu de dispense,* après ma question par rapport au serment demandé " Scott paraissait exalté et très contrarié." He also says: " Je n'ai vu Scott que deux fois, c'est par le curé que j'ai su que Scott voulait que je le mariasse, mais *pour lui-même, il ne m'a jamais personnellement requis.*" This transaction is also sworn to by Grégoire Féré, one of Respondents' witnesses who thus described it: " Dans l'année 1845, dans le mois de juillet, je crois, à la suite d'une retraite ou de quelque autre cérémonie religieuse, Scott me fit demander de me rendre chez lui. J'y suis allé, j'ai vu là Scott, Madame Scott (Dame Paquet), et quelques témoins qui s'étaient rendus là, je trouvai aussi des préparatifs qui indiquaient une cémonie. En arrivant Scott me dit : "Je suis pour me marier, et je veux vous avoir comme mon témoin en votre qualité d'un de mes meilleurs amis. Il y avait là une table couverte d'un tapis et des chandeliers d'argent. M. Scott me montra aussi une bouteille de champagne en disant: "Quand le mariage sera célébré, nous prendrons le champagne, pas avant." Le père Martin, jésuite, qui devait faire le mariage ayant tardé un peu, quelqu'un alla le chercher. Le père Martin est arrivé et s'est assis près de la table. Scott a pris Dame Paquet par la main, et s'est approché du père Martin. Le père Martin lui dit alors qu'il y avait quelques obligations rélativement à son mariage qu'il était de son devoir de lui communiquer. Là-dessus, le père Martin lui dit, qu'avant de procéder au mariage, il fallait qu'il s'obligeât par serment à laisser élever ses enfants dans la religion catholique. Scott, qui comprenait qu'on voulait l'obliger à élever ses enfants catholiquement, se choqua, et dit : " J'ai toujours été assez libéral, et laissé faire mes enfants en matière de religion comme ils voulaient Moi, dit-il, je suis né protestant, je ne veux pas qu'on m'oblige d'élever mes enfants dans une autre religion, et ajouta qu'il ne voulait pas prêter un serment qui

lui en faisait une obligation." Le père Martin répondit qu'il ne pouvait pas procéder au mariage sans qu'il vînt à prêter ce serment. Et, en se levant, Scott là-dessus dit : "Tout cela est matière de forme, et tenant par la main Dame Paquet, il ajouta qu'elle était devant Dieu et devant les hommes sa légitime épouse, et qu'il la prenait pour telle." Le père Martin, entendant cela, a pris avec précipitation son chapeau et son papier et s'en est allé. Un des témoins est allé après lui, et il a persisté à s'en aller. Je suis resté avec quelques autres personnes chez Scott et nous avons bu le champagne. D'après tout ce que j'ai vu là et entendu, il est évident que, dès ce temps-là, Scott voulait bien sincèrement faire célébrer son mariage par le père Martin, et si cette celébration n'a pas eu lieu, c'est dû uniquement à la promesse sous serment qu'on voulait exiger de lui comme je viens de le dire. Scott me dit en particulier et personnellement. "Puisqu'il y a tant de difficultés, mon ami, dans votre religion, je me ferai marier par un ministre protestant." Prochainement, j'irai à Montréal chercher mes dispenses chez M. Ross, pour me faire marier par un ministre protestant." Depuis ce qui s'était passé avec le père Martin, Scott m'a parlé plusieurs fois de sa détermination de faire célébrer son mariage, et je comprenais que c'était par un ministre protestant. Le père Martin était venu à St-Eustache, soit à l'occasion d'une retraite ou à l'occasion d'une bénédiction de cloche." The precipitate departure of the père Martin, upon this occasion, is susceptible of explanation, although he was neither the *curé* nor the *vicaire* of the parish, and although he had no *dispense* or authority from the Bishop, he was ready to be a witness, témoin au consentement de mariage, provided only that it were après avoir obtenu de la partie protestante, ce qui est exigé par la cour de Rome en pareille circonstance. The distinctions made by the père Martin, si Mme Paquet avait *donné son consentement et que je l'eusse entendu le donner,* j'avais le droit de faire l'acte de mariage, et l'on aurait pu m'y forcer, *avant même que Scott eût consenti à la condition demandée, et dans ce cas le mariage aurait été et valide et licite.* Lorsque Scott m'a refusé la promesse demandée, le mariage eût été valide mais non licite de ma part, are quite intelligible upon reference to the articles *Gomine* (mariage à la), and *Clandestin,* in the *Dictionnaire de droit canonique* of Durand de Maillane. The ultramontane doctrine so totally opposed to the *libertés de l'Eglise gallicane,* and so contrary to the ordinances of the kings of France, which are law in Lower Canada, affords the key to these subtle distinctions, and explains the pretensions of the Respondents, loco. cit., vo *Clandestin,* p. 522 : "Ceux qui croient que le curé n'est pas le ministre de ce sacrement

disent qu'il n'est pas nécessaire qu'il y consente ; il suffit, selon ses auteurs, *que le mariage soit contracté en sa présence, et qu'il sache ou connaisse l'intention des parties. En conséquence ces mêmes auteurs soutiennent que si deux personnes surprenaient un curé, et contractaient mariage devant lui en présence de deux ou trois timoins,* leur mariage serait valide, parce qu'il aurait été contracté en présence du curé, *modo Parochus fuerit adhibitus, Fagnan in quod nobis, de cland. despon.* Cette dernière condition n'est pas nécessaire suivant Corradus, *De despon.*, lib. 7, cap. 7, No 36, Navarre, Sylvius et Barbosa, *De offic. et potest. Parochi.*, cap. 21, No 50, *Parochus* dit : *Valide assistit matrimonio, etiamsi ad alium finem vocatus, vel casu præsens ; licet vi debentis,* dit toujours le même auteur, *dummodo tamen intelligat consensum contrahentium licet etiam renuens et dolose adductus, valide assistit ; dummodo probe intelligat et audiat contrahentium verba, nisi claudens aures affectatus esset non intelligere, quamvis ipse nulla verba proferat. Concludo, igitur, præsentiam Parochi in matrimoniis necessariam non tantum corpoream sed etiam moralem requiri, cum intelligentiâ et advertentiâ actûs.* C'est la doctrine en général des ultramontains ; elle est uniforme parmi eux à peu de chose près ; quelques docteurs français l'ont soutenue, et voici une consultation de Sorbonne, *donnée* à l'occasion d'un mariage à la Gomine, c'est-à-dire, fait en présence du curé et malgré lui. (Voyez *Gomine.*) " Le mariage dont il est parlé dans le mémoire ci-joint a été illicitement contracté, et ceux qui ont concouru à ce contrat comme l'ayant conseillé et y ayant assisté en qualité de témoins, sont très punissables ; il y a des diocèses où ils auraient encouru l'excommunication *ipso facto,* mais il est valide et indissoluble, selon le sentiment commun des théologiens qui se divisent sur la question ; si un tel mariage est sacrement, un grand nombre étant pour l'affirmative, parce que, selon eux, les contractants sont les ministres du sacrement, et les autres pour la négative, voulant que le prêtre seul soit le ministre de ce sacrement : mais les uns et les autres se réunissent, et disent d'une commune voix, qu'un tel mariage est un vrai contrat indissoluble de sa nature, parce que rien ne manque de ce qui est nécessaire et essentiel à un véritable contrat ; les contractants sont personnes légitimes et habiles à contracter ; ils ont donné leur consentement mutuel librement et sans être forcés ; la solennité requise par le concile de Trente sous peine de nullité a été observée, le contrat s'est passé en présence de deux témoins, et d'un prêtre commis par le propre curé ; les uns et les autres ont su ce qui se passait en leur présence ; il n'y a rien contre la raison dans ce mariage par rapport à l'effet du contrat, mais seulement par rapport aux formalités prescrites et non observées

et seulement accidentelles ; ce qui fait que l'action est criminelle, telle que serait celle d'une personne qui, hors le cas de nécessité, baptiserait sans observer les cérémonies de l'Eglise ; mais on ne pourrait pas conclure de là, que le baptême et le mariage ne seraient pas valablement administrés : c'est pourquoi l'official ne doit pas prononcer dans cette cause que le mariage est nul, et qu'il est permis aux parties de contracter avec d'autres, si bon leur semble, mais seulement qu'elles se présenteront devant leur curé, pour recevoir la bénédiction nuptiale, c'est ainsi que le parlement de Paris a jugé en cas pareil. Délibéré en Sorbonne, le 3 janvier 1712, Habert, De Precelles. Ceux qui croient que le prêtre est le ministre *du sacrement*, sont d'un sentiment contraire, ils estiment que les mariages sans la bénédiction du prêtre sont absolument nuls, et l'on verra ci-dessous que les parlements suivent cette règle. Cependant, quant au *for* de la conscience, l'Eglise ne s'est pas encore expliquée sur la validité de ces mariages ; et dans le pays où l'on suit le concile de Trente, ces mariages ne sont pas cassés quoique ceux qui les contractent y soient poursuivis comme infractaires de la police ecclésiastique ; on les oblige de se présenter de nouveau à leur curé ou à l'Ordinaire, pour en recevoir la bénédiction nuptiale dans toutes les formes prescrites par le Rituel." It is evident that since 1776, when the above was written, the Church of Rome has explained herself upon the validity of such marriages, but whatever may be that explanation, it is not law here, and *this attempt to introduce it must be put down by our courts.* Respondents have contended that the proceeding before Mr. Ancé was the complement of that before the père Martin, and is proof that the deceased had a disposing mind and was sane on the 16th December, 1851, when the entry in the register was made. Mr. Ancé states that he gave explanations to Scott about theoath required of him so as to remove the objections offered to the père Martin. These explanations are to be found in his testimony, for my part I must say that I find neither distinction nor difference in them, and no proof of sanity in adopting them. The mother had not only herself freely followed her religious faith during twenty years, but had brought her children freely in the same faith, except the daughter who was removed from her altogether and educated by her aunt, the Appellant. The proceeding in 1845, savours much of drunken excitement, and is so to be explained, otherwise it is difficult to understand how a reasonable man could expect to be validly married without banns or license from any authority civil or ecclesiastical by a stranger to the parish. From the evidence of Féré, Scott had doubts of the fidelity of Respondent, and the testimony of Ellen Gamble confirms the existence of these doubts. If he had

intended seriously to marry her, as he himself said to Mr. Féré, all he had to do was to apply to Mr. Ross for a licence from the governor general holding the seal of the Prerogative Court of Canterbury, and to be married by his own presbyterian minister. So far from doing this he continued to live in concubinage with the Respondent, she residing in one house and he in the other for more than six years, after the transaction with the père Martin. No dou' t that if he had availed himself of the law of Lower Canada to legitimise his children *per subsequens matrimonium*, and abandoning his illicit and scandalous intercourse with the Respondent, had made her his lawful wife, he would have done an act to be applauded. But whether from false shame, or from regard to his sisters who had kept his house for him and educated his daughter as an illegitimate child, true it is that he persisted in keeping these children and their mother in a state of humiliation and dependence. He might have relieved them from their condition at any time, but he would not do so during twenty years under the circumstances, then can his proceeding before Mr. Ancé be received as affording proof of sanity, and of a disposing mind ? I cannot believe that it does ; on the contrary, I attribute it to the interested practices of those who surrounded him in his last moments when laboring under delirium, and when ready to sign orders to any amount to be relieved from the imaginary conspirators who possessed his disturbed brain. The learned judge who delivered the judgment of the court below, omitted all notice of the allegations in the Appellant's declaration that the " said pretended marriage was secret and clandestine," and very rapidly and summarily disposed of another allegation, viz., that this marriage was null, as taking place *in extremis* or à l'extrémité de la vie. In my view of the case, each of these points requires attentive consideration. To begin with the allegations of *clandestinité*, at the 24th session of the Council of Trente, held on 11th November, 1563, it was ordained : " *Qui aliter quam præsente Parocho vel alio sacerdote de ipsius Parochi seu Ordinarii licentiâ, et duobus vel tribus testibus matrimonium contrahere attentabunt eos S. Synodus ad sic contrahendum matrimonium omnino inhabiles reddit et hujusmodi contractus irritos et nullos esse decernit.*" Upon this Pothier, *Du Contrat de mariage*, part 4, chap. 1, sect. 3, art. 1, parag. 4, n° 348, says : " Observez que quoique la forme prescrite par le concile pour les mariages soit très sage et qu'elle ait été en conséquence adoptée et confirmée par les ordonnances de nos rois, néanmoins le concile excédait son pouvoir en déclarant nuls, ou de sa seule autorité, les contrats de mariage où elle n'aurait pas été observée ; car les mariages, en tant que contrats, appar-

tiennent comme tous les autres contrats à l'ordre politique et ils sont par conséquent de la compétence de la puissance séculière et non de celle du concile, à qui il n'appartenait pas de statuer sur leur validité ou leur invalidité." Pothier, n° 349 : " Le concile de Trente ne put être reçu en France, malgré les efforts que firent la cour de Rome et le clergé pour l'y faire recevoir. Tous les catholiques reconnaissent, et ont depuis toujours reconnu, que les décisions de ce concile sur le dogme sont la foi de l'Eglise ; *mais l'atteinte qu'il donne* dans ses décrets de *discipline au droit de la puissance séculière et à nos maximes* sur un très grand nombre de points, fut *et sera toujours un obstacle insurmontable à sa réception dans ce royaume.* Le décret du concile ne pouvant pas remédier aux abus des mariages clandestins en France, où ce concile n'était pas reçu, et où ses décrets ne pouvaient par conséquent avoir aucune autorité, le roi Henri III, jugea à propos *d'y remédier lui-même, ayant dans lui-même autant de pouvoir pour cet effet, qu'en avait le concile,* comme nous l'avons établi dans la première partie de ce traité. C'est ce qu'il fit par son Ordonnance, rendue aux Etats de Blois, article 40, où il est dit : " Avons ordonné " que nos sujets ne pourront *valablement* contracter mariage " sans proclamations précédentes ; après lesquels bans, seront " épousés publiquement ; et pour témoigner de la forme y as- " sisteront quatre témoins dignes de foi, dont sera fait " registre, etc." Et par l'article 44, il est défendu à tous notaires, sous *peine de punition corporelle, de recevoir aucunes promesses de mariage par paroles de présent.* Par l'édit de Henri IV, du mois de décembre 1606, le roi veut que les causes concernant les mariages, appartiennent à la connaissance des juges d'église à la charge qu'ils sont tenus de garder les Ordonnances, même celles de Blois en l'article 40 ; et suivant icelles déclare les mariages qui n'*auront été faits et célébrés en l'église, et avec la forme et solennité requises par le dit article, nuls et non valablement contractés, comme peine indictée par les conciles.* La déclaration du roi Louis XIII, de 1639, article 1, ordonne que l'article 40 de l'Ordonnance de Blois soit exactement gardé, et en l'interprétant, qu'à la célébration d'icelui assisteront quatre témoins *avec le curé, qui recevra le consentement des parties, et les conjoindra en mariage suivant la forme* pratiquée en l'Eglise. Fait *défense à tous prêtres de célébrer aucun mariage qu'entre leurs paroissiens, sans la permission par écrit du curé ou de l'évêque.* Il ne suffirait donc pas pour la validité du mariage, que les parties allassent *trouver à l'église leur curé, et qu'ils lui déclarassent qu'ils se prennent pour mari et femme : il faut que le curé célèbre le mariage.* C'est pourquoi par arrêt de 1676, rapporté par d'Héricourt, part. 3, chap. 5, art. 1, n° 27,

un mariage dont les parties s'étaient fait, dans l'église, donner acte par un notaire, sur le refus fait par un curé de le célébrer, fut déclaré nul et en conséquence, par arrêt du 10 mai 1713, un enfant né de ce mariage fut déclaré bâtard." "For the validity of marriage, says Pothier, n° 354, "il faut non seulement qu'il ait été *célébré en face d'Eglise*, mais *encore que le prêtre qui l'a célébré ait été compétent*." At n° 355, he says: "Le prêtre compétent pour la celébration des mariages, est le *curé des parties*." At n° 361, "la peine des parties qui ont fait célébrer leur mariage par un prêtre incompétent, est la nullité de leur mariage. Quoique le concile de Trente, qui a prononcé cette peine, comme nous l'avons vu *suprà*, n° 348, n'ait pas été reçu en France, nos rois ont adopté et confirmé sa disposition à cet égard." At n° 362, Pothier lays down: "Cette nullité des mariages célébrés par un prêtre incompétent, n'est pas de la classe de celles qu'on appelle relatives, qui n'ont lieu que lorsque la partie s'en plaint: *elle est de la classe de celles des nullites absolues, et elle ne peut se purger ni se couvrir que par une réhabilitation du mariage des parties, c'est-à-dire, une nouvelle célébration faite par le curé ou avec sa permission, ou celle de l'évêque. Il n'importe que les personnes qui se sont mariées hors de la présence et sans le consentement de leur propre curé, soient majeures ou mineures, enfants de famille, ou usantes de leur droit; nos lois ci-dessus rapportées, qui déclarent nuls ces mariages, n'ayant fait à cet égard aucune distinction.* On trouve néanmoins, adds Pothier, dans les recueils d'arrêts quelques arrêts qui ont déclaré des parties non recevables dans l'appel comme d'abus par elle interjecté, de la célébration de leur mariage, sur le prétexte qu'il avait été célébré par un prêtre incompétent, hors de la présence et sans le consentement du curé, lorsque l'appel n'avait été interjecté qu'après un *long temps de co-habitation publique et sans que personne se fût jamais plaint de ce mariage.* La réponse est, que ces arrêts *n'ont pas jugé qu'un mariage, qu'on supposerait célébré par un prêtre incompétent puisse jamais être valable, et que ce vice puisse être purgé par quelque laps* de temps que ce fût, mais qu'ils ont seulement jugé qu'eu égard aux *circonstances de la cause, l'Appelant était indigne d'être écouté et reçu à entrer dans la discussion qu'il alléguait, et qu'on devait présumer que les choses s'étaient passées dans les règles, et que le prêtre qui avait célebré le mariage, avait eu la permission du curé.* Ce que nous disons est conforme à ce qui a été observé par M. d'Aguesseau dans un Mémoire qui se trouve dans le 5 vol. de ses *Œuvres,* après le 57e Plaidoyer." To keep the clergy under proper control and compel obedience to the law, the french kings "outre les peines canoniques que les juges pourront prononcer (against priests performing

unlawful marriages, in contravention to the Royal Ordinances) contre eux, les dits curés et autres prêtres, tant séculiers que réguliers, qui auront des bénéfices, soient (*par nos juges*) *privés, pour la première fois, de la jouissance de tous les revenus de leur cure et bénéfices pendant trois ans, à la réserve de ce qui est absolument nécessaire pour leur subsistance, etc.* * * *Qu'en cas d'une seconde contravention, ils soient bannis pendant le temps de neuf ans des lieux que nos juges estimeront à propos.* Que les prêtres séculiers qui n'auront pas des bénéfices, soient condamnés au *bannissement pendant trois ans, et en cas de récidive, pendant neuf ans; et qu'à l'égard des prêtres réguliers, ils soient envoyés dans un couvent de leur ordre, que leur supérieur leur assignera hors des provinces marquées par les arrêts de nos cours, ou les sentences de nos juges, pour y demeurer renfermés pendant le temps qui leur sera marqué par les dits jugements, sans y avoir aucune charge, ni fonction,* ni voix active et passive." (Pothier, *Mariage*, n° 364.) The priest under the law of France in respect of marriage was also a civil functionary and held as such to assist actively in carrying out the laws intended to restrain clandestine and irregularly contracted marriages. In the common law courts *nos juges* were invested with the necessary authority to compel them to carry out the laws of the State. Acting upon the *Ordinance, Edits, Déclarations et Règlements* of France in this behalf, we have a remarkable instance in this colony under the french government, again, given to us by the Conseil supérieur in the arrêt du 12 juin 1741 only 18 years before the conquest, being the arrêt *qui rend nuls les mariages des mineurs faits sans le consentement de leurs parents et qui enjoint aux curés d'observer les ordonnances canoniques concernant la publication des bans.* Edits et Ordonnances, vol. 2, p. 204 et seq., 8vo Edition, 1855. (1 *R. J. R. Q.*, p. 37.) The Conseil supérieur among, other things, by this arrêt," enjoint au vicaire général du diocèse de cette ville (Québec) et à tous autres vicaires généraux, d'observer les Ordonnances et Constitutions canoniques concernant la *publication et dispense des bans, laquelle ne pourra être accordée pour marier des mineurs sans le consentement des pères et mères, tuteurs ou curateurs ou qu'il n'y ait un jugement rendu en connaissance de cause sur les oppositions au défaut de consentement des dits pères et mères, tuteurs ou curateurs.*" Enjoint pareillement à tous curés et prêtres *tant séculiers que réguliers, de marquer dans les actes de célébration de mariage, etc., d'y faire appeler et assister,* non *pas seulement deux témoins, mais quatre témoins suivant les Ordonnances, Edits Déclarations et Règlements. Ordonne* qu'en *conformité des articles* 8 *et* 9 *de la déclaration du Roi, du* 9 *avril* 1736, *les*

actes de célébration de mariage seront inscrits sur les registres de l'église paroissiale, du lieu où le mariage sera célébré, et en ce cas que pour des causes justes et légitimes, il ait été permis de le célébrer dans une autre église ou chapelle, les registres de la paroisse dans l'étendue de laquelle la dite église ou chapelle seront situées, seront apportés lors de la célébration du mariage pour y être l'acte de la dite célébration inscrite. Fait défense d'écrire et signer en aucun cas les dits actes de célébration sur des feuilles volantes, à peine d'être procédé extraordinairement contre le curé et autres prêtres qui auraient fait les dits actes, lesquels seront condamnés en telle amende ou autre plus grande peine qu'il appartiendra, suivant l'exigence des cas." It is thus seen that the highest law court in this colony, carried out the laws of the kingdom of France regulating marriage in their spirit, and conformably to what was practised in the mother country at the time and afterwards, as attested by Pothier. To come now to the test of the certificate and entry of marriage by Mr. Ancé in the parish register, we must again refer to Danty, *Preuve par témoins*, p. 102 : " L'acte de célébration n'est point aussi essentiellement nécessaire à la validité du mariage, il n'est que pour prouver que le mariage a été légitimement contracté et, *sans cet acte, le mariage est d'ordinaire déclaré nul et clandestin.* Cela supposé, il faut examiner les cas dont Boiceau n'a point parlé, dans lesquels la preuve par témoin peut être reçue ou rejetée en ce qui regarde le mariage public et solennel. 1° Il est certain *que la preuve par témoin doit être rejetée,* à l'effet de prouver *qu'il y a eu des bans publics, ou que les parties en ont obtenu dispense, ou que l'Ordinaire leur a permis de se marier devant un autre prêtre que devant le propre curé. Ces actes doivent être rédigés par écrit suivant l'Ordonnance, ils doivent être insérés dans les registres et ainsi ils doivent être rapportés.*" The entry in the register, is *vu la dispense de toute publication de mariage, ainsi que celle du temps prohibé par l'Eglise, accordée par Monseigneur Ig. Bourget, évêque de Montréal,* comme il appert par sa lettre en date de ce jour, nous prêtre *vicaire soussigné autorisé à cet effet.*" The marriage then is not by the propre curé, but supposed to take place by special authority in writing from the Bishop of the diocese to Mr. Ancé. Where is the writing? It is not produced and its non-production is not accounted for satisfactorily. Why was is not rapporté ? Monseigneur Bourget has been examined as a witness, contrary to the prohibition of parol testimony contained in the Ordinances, but neither he nor Mr. Ancé, nor any other witness, professes to prove the contents or the form and tenor of this *dispense.* If, however, the evidence of Monseigneur is to be looked at,

we find him deposing : " Par les règlements canoniques, *les mariages entre catholiques et protestants sont défendus, et les prêtres catholiques n'y peuvent procéder que par une permission expresse du Pape donnée aux Evêques à cet effet.*" Admitting to the fullest extent the power of the See of Rome in all matters of faith and religious discipline, "de dogme," no court of justice can recognize the prohibition of marriage between roman catholic and protestants, unless acquiesced in and sanctioned by the civil power, or power of the State. It is needless to say that in Canada no such sanction has been or could have been given. Where is the *permission expresse*, what are its terms and limits, when was it given, by the Papal authority or the court of Rome ? Of this there is no proof, yet the warrant of the Bishop for acting at all is the *permission expresse*, not produced, and that of Messire Ancé is the dispence and license not produced either. But, the question here is, whether in this case and under these circumstances, Mr. Ancé was the proper curé of the municipal law, regularly autorized to act as a civil functionary in carrying out the law of Lower Canada, that is the old law of France in relation to marriage ? Between the règlement canonique of the See of Rome and the common law there is no connection, there is direct repugnance, for the one prohibits what the other permits. The Ordinances require banns, or a dispense and a marriage in *facie Ecclesiæ* with the accustomed rites ; in the absence of this, if there be a marriage, can it be otherwise than void for clandestinité ? The priest who made the entry, and the Bishop under color of whose authority he professed to act claim to proceed upon the papal authority, not the royal, authority of the kings of France, under the law of the land ; their acts then must be illegal, and cannot be recognized as valid by the law courts here. To cite again from Danty, p. 119, additions sur le chapitre 5 : " Boiceau, dans ce chapitre, fait trois espèces de mariage clandestin, of the two first mention need be made here, but la troisième is, quand deux personnes majeures et usant de leurs droits *se sont promis mariage par paroles de présent, sans observer aucune des cérémonies de l'Eglise,* et que ce mariage n'a point été rendu public ensuite par l'une des trois manières en laquelle il soutient qu'un mariage doit être réputé public, savoir par promesse de mariage faites depuis par paroles de présent dans l'assemblée des parents *ou quand le mariage a été réitéré en face d'Eglise devant le propre curé* ou qu'il y a eu co-habitation en qualité de mari et femme. The *dispense* not being produced or proved, the whole transaction then is to be viewed, as if Mr. Ancé had received no authority at all from the Bishop, or at best supposing that he had authority, it was insufficient, as far as the

State and the public authority were concerned, and only of value in the court of Rome. Mr. Ancé does not profess to have acted by the authority of the curé, on the contrary, he alleges another authority, if that authority then be insufficient or not proved, there is a want of the presence du propre curé, which vitiates the whole proceedings and renders the marriage *clandestin and nul.* C'est une maxime certaine établie par les lois *de l'Eglise et de l'Etat que la présence du propre curé* est essentielle pour la *validité du mariage.* Le concile de Trente, conforme en cela à nos ordonnances, en a fait un décret formel ; il a déclaré nuls les mariages célébrés devant tous autres prêtres : *Nullos ac irritatos hujus modi contractus esse decernit, pro ut presente decretos irritos facit et annulat.* Les Ordonnances du royaume et l'Edit de 1697 ont établi conformément aux saints canons, que *la présence du propre curé* était une solennité essentielle au sacrement de mariage. Cochin, XI[e] *Plaidoyer*, vol. 1, p. 147, in-quarto. Again Mr. Scott lived, died and was buried as a protestant, he had no *propre curé* as contemplated by the law of France, and it does not suffice that the woman had her *propre curé* being a roman catholic. Le concile impose aux fidèles, lorsqu'ils veulent se marier l'obligation *d'instruire de leur mariage l'Eglise particulière dont ils sont membres au moins en la personne du curé* de cette Eglise qui en est le chef et qui la représente ; et c'est pour cet effet qu'il ordonne que leur mariage sera célébré par le curé ou de son consentement. Cette obligation est imposée à l'une et à l'autre des parties ; l'une et l'autre doit donc la remplir, pour qu'on puisse dire que la forme prescrite par le concile a été observée. C'est pourquoi, lersque les parties sont de différentes paroisses, quoique le mariage ait été célébré par le curé de l'une des parties, la forme prescrite par le concile n'est pas remplie, si l'autre partie n'a pas fait concourir son curé à son mariage, en lui faisant publier les bans. Ce mariage qui, quoique contracté par le curé de l'une des parties, l'a été à l'insu du curé de l'autre partie, a donc *le premier caractère de clandestinité, qui consiste dans l'inobservation de la forme et solennité prescrite pour la célébration des mariages.* On convient que lorsque l'une et l'autre partie ont satisfait à la formalité de faire intervenir à leur mariage le consentement de leur curé en le faisant célébrer par le curé commun, on passe par-dessus l'omission de la formalité de la publication de bans qui devait précéder, le mariage ayant été contracté entre entre majeurs *et ayant été public ;* mais il y a une grande différence entre cette formalité, qui n'est qu'un préalable au mariage, et la forme à laquelle chacune des parties est assujettie de faire intervenir *le consentement de son curé ou de*

l'évêque, laquelle forme est une forme du mariage même, sans laquelle il ne peut être valable. C'est pourquoi, lorsque les parties sont de différentes paroisses, le mariage, quoique célébré par le curé de l'une des parties, est nul, *si le curé de l'autre partie n'y a pas concouru, soit en publiant les bans, soit de quelqu'autre manière que ce soit, quand même les parties seraient majeures ; le concile et les ordonnances de nos rois, qui ont adopté sa disposition, n'ayant fait à cet égard aucune distinction entre les majeurs et les mineurs.* Pothier, *Mariage*, partie 4, chap. 1, section 3, art. 2, parag. 4, n° 366. *Mémoire de M. d'Aguesseau*, 5e tome de ses œuvres. La clandestinité qui rend nul le mariage fait hors de la présence et sans le consentement du curé des parties consiste en deux choses: 1° dans le défaut d'une forme et solennité requise à peine de nullité; 2° dans le *préjudice que l'inobservation de cette forme pourrait souvent faire à des tiers, en leur dérobant la connaissance d'un mariage qu'ils peuvent avoir intérêt de savoir et d'empêcher.* Quoiqu'il ne soit pas au pouvoir des parens des majeurs de former un obstacle insurmontable au mariage qu'ils se proposent de faire, ils ont néanmoins un très grand intérêt d'en être avertis, parce qu'en étant instruits, ils peuvent souvent par le retard qu'ils apportent au mariage et par leurs remontrances faire ouvrir les yeux à la partie qui se proposait de faire un mariage peu convenable et la déterminer à ne pas le faire. La forme présentée par le concile et par les ordonnances de célébrer le mariage en la présence ou du consentement du curé, laquelle est prescrite aux deux parties a un autre fondement principal, que nous avons rapporté ci-dessus. C'est pourquoi quand même l'intérêt qu'on les familles d'être averties du mariage, ne se rencontrerait pas, l'inobservation de cette forme ne laisse pas de devoir faire déclarer nul un mariage auquel, quoiqu'il ait été célébré par le curé de l'une des parties, le curé de l'autre partie n'a pas concouru sans qu'on doive faire aucune distinction, entre le mariage des majeurs et celui des mineurs, le concile et les ordonnances de nos rois qui ont prescrit cette forme n'ayant fait aucune distinction. Of the publication of banns, it may be said, as of the entry in the parish register," cet acte est un acte public. Le curé ou le prêtre qui tient sa place, fait en cela une fonction publique que nos lois lui attribuent; et comme elle appartient à l'ordre civil, il en est comptable au juge séculier." Pothier, *Mariage*, n° 376." Entre autres formes (says Charondas, le Caron, in his *Résolutions*, partie 3, tit. 10, pp. 160, 161), sont requises trois publications précédentes de bans qui se doivent faire en l'église paroissiale par trois divers jours de fêtes et après eux *faut épouser publiquement en la présence de quatre personnes dignes de foi pour témoins*, ce

qui convient aussi cap. cumin tua de sponsal. et matrim. quod integrum extat in quarta collectione decret alium ubi Innocentius III scribens ad Bellovacensem episcopum : *Bannis* inquit, ut tuis verbis, utamur, *in Ecclesia, secundum consuetudinem gallicanæ Ecclesiæ editis.*" Puisque par l'autorité des conciles, de l'ordonnance, et des anciens docteurs de l'Eglise chrétienne on ne peut valablement et légitimement réputer mariage, la conjonction et cohabitation de l'homme et de la femme auparavant la *bénédiction nuptiale faite solennellement en l'église, c'est un abus d'appeler mariage consommé une clandestine et illicite conjonction.* Again at chap. 8, p. 181, Charondas says entre les constitutions de Basilius Macedo, empereur, il y a un article qui porte que la *bénédiction des noces doit se faire publiquement et non en cachette.* Aussi y en a des constitutions des papes et entre autres C. cum societas 27 qui est de Léon III, ubi scribitur, non dubium est illam mulierem non pertinere ad matrimonium, cum qua docetur non fuisse nuptiale sacramentum. Le semblable se dit avoir été ordonné par les Capitulaires de Charlemagne et y a détermination expresse au concile de Trente, sessio. 24, cap. 1, de reformat. matrimo., et en l'ordonnance de Bloys. Et telle conjonction clandestine qui tient plutôt du concubinage que du mariage ne peut être autorisée par contrat de mariage encore qu'il y en ait des enfants. Nam instrumenta acta ad probationem matrimonii non sunt idonea nisi constat nuptias fuisse celebratas C. neque sine nuptiis Cod. de nuptiis. Tellement qu'outre la promesse et contrat de mariage, doivent être faits les bans publiquement en l'église et en sont requis trois. Il suffira de réciter deux arrêts l'un du 26 juillet 1603, et l'autre du 8 janvier 1605, which gives. D'Héricourt, *Lois ecclésiastiques*, partie 2, chap. 5, art. 1er, page 58, says : " Le concile de Trente a exigé la *présence du propre curé* des parties pour la validité du sacrement, et l'ordonnance de Blois a adopté la disposition. On ne doit pas douter que l'Eglise et l'Etat se réunissant, ne puissent *exiger sous peine de nullité*, de nouvelles formalités pour une action si solennelle." We find in the 1er *Journal du palais*, p. 585, arrêt du 16 juin 1674, these words : " Le concile de Langres, tenu en 1404, après avoir défendu sous des peines *rigoureuses les mariages clandestins, mit pour l'une des preuves de la clandestinité, le défaut de la bénédiction, cum matrimonium fit per verba de presenti, non cum solemnitate debit avel cum non dabatur honor vel benedicto in facie Ecclesiæ.* Aux conciles d'Angers tenus en 1274 et 1304, de Saumur en 1253, de Chartres et de Rouen en 1526, de Paris 1557, et en plusieurs autres il est parlé de cette bénédiction en des termes qui *nous marquent sa nécessité.* Telle est encore la disposition *des ordonnances de nos rois et*

particulièrement de l'ordonnance de 1639 qui est l'ouvrage d'une jurisprudence consommée et dans laquelle défunt M. l'avocat général Bignon, qui l'a rédigée a ramassé tout ce qui était dans les lois précédentes, et tout ce que sa sagesse et sa grande expérience lui a fait juger nécessaire pour le repos des familles, et pour la pureté de la discipline." Durand de Maillane, *Dictionnaire*, voce *Clandestin*, vol. 1, p. 500, says: "Rien n'est si sévèrement défendu que les mariages clandes- "tins. Ceux qu'on appelle à la Gomine, et dont nous avons "parlé ne sont pas mieux traités dans le royaume. Un juris- "consulte disait touchant ces mariages, qu'il ne faut pas tou- "jours examiner les actions humaines par le point de théologie, "il vaut mieux dans ces rencontres, envisager cet intérêt "public, dans lequel il est de la dernière conséquence de conser- "ver les formes et solemnités ordinaires du sacrement, que "de s'arrêter à des distinctions de l'Ecole, inventées pour met- "tre les consciences à couvert et qui ne jettent qu'un très "grand désordre dans les familles, et troublent cette harmonie "qui entretient les états dans leur lustre et dans leur splen- "deur. Il serait donc d'une dangereuse conséquence, d'ad- "mettre que la seule présence du curé est suffisante pour faire "valider un mariage. Ce serait plutôt une profanation pu- "blique, un mystère d'abomination, et faire d'une action toute "sainte, un scandale qui retournerait au mépris de la religion "et de ses ministres, et au bouleversement de toutes les sages "précautions que le saint concile de Trente et les Ordon- "nances ont prises pour proscrire ces sortes de désordres." The last authority which I shall cite, as to the clerical observances to be pursued by the curé in the performance of the marriage ceremony in the 89th of the *Novellæ Constitutiones* of the emperor Leo. "Imperator, eidem Styliano. Quemadmodum "adoptionem promiscue habitam neglexit vetustas, quam ta- "metsi sine precibus sacrisque ceremoniis peragi lege permit- "teret, non tamen illam se parvi pendere putabat ita et abso- "lutam matrimonii constitutionem, dum id citra jam receptam "benedictionem iniri sineret, neglexisse videtur. Sed vete- "ribus istius voluntatis fortasse ratio inveniri possit: à nobis "vero, cum divina gratia ad honestius multo sanctiusque vi- "tæ institutum jam res comparatæ sint neutrum dictorum ne- "gligi convenit. Itaque quemadmodum adhibitis sacris depre- "cationibus adoptionem perfici præcipimus: sic sane etiam "sacræ benedictionis testimonio matrimonia confirmari jube- "mus. Adeo, ut, si, qui citra hanc matrimonium ineant, id ne "ab initio quidem ita dici, neque illos in vitæ illa consuetu- "dine matrimonii jure potiri velimus. Nihil enim inter cœ- "libatum et matrimonium, quod reprehendi non debeat, me- "dium invenias. Conjugalis vitæ desiderio teneris? Con-

"jugii leges serves necesse est. Displicent matrimonii molestiæ. Cœlebs vivas, neque matrimonium adulteres, neque falso cœlibatus nomine culpam prætexas." I have already said that Scott being a protestant had no proper curé at St. Eustache. With reference to the marriage of protestants, the law of Lower Canada, as a british colony, must be the law of England, as it stood prior to the passing of the statute of the 26, George 2nd, cap. 33, intituled "An act for the preventing of clandestine marriage," or the old marriage act of 1753. There can be no doubt now, that the intervention of a minister at the celebration of the marriage is essential to its validity, and was required by the law of England as it stood before the passing of the Marriage Act. Ropers' Husband and Wife, by Jacobs, vol, 2, p. 445; Shelford on Marriage and Divorce 37, 38, 54, 55; 1 Burge's Colonial Law, 156. Mr. Ancé if he ever [illegible] as a minister at all, most certainly was not a minister of the Church of England and Ireland, or of the Church of Scotland, as such as are authorized to keep registers of marriages and to perform marriages, under our local laws. Under the old law of France, as it stood in Canada at the time of the conquest, no distinction was recognised in marriages between protestants and catholics. The practice pursued in this case, and the permission given by Monseigneur Bourget, and the regulations of the See of Rome, are wholly unsupported by law, and are not to be recognized in the Queen's courts. If clergymen of the Church of Rome choose to perform the marriage ceremony between catholics and protestants, it must be done in the usual form proscribed by law in other cases. In his *Mémoires sur les mariages des protestants*, in 1785 Mr. Joly de Fleury says, page 162: "Si celui qui reçoit le sacrement de mariage doit être en état de grâce, c'est une disposition intérieure qui dépend de sa bonne foi. Tant qu'il n'y a ni loi de l'Eglise ni loi de l'Etat qui établissent rien sur ce sujet, les évêques particuliers n'ont pas le pouvoir d'établir une nouvelle discipline, s'ils l'établissent par des Mandements, il y aurait lieu à l'appel comme d'abus. Quand le curé se croirait en droit d'examiner verbalement ceux qui se présenteraient, il ne peut jamais avoir le moindre prétexte d'exiger ni la communion ni un acte d'abjuration par écrit ou une profession de foi, ce qui est la même chose, qui ne peuvent servir qu'à faire faire des mariages par écrit et peut-être des sacrilèges de mauvaise foi, et à entretenir les Assemblées par rapport aux autres." At page 150, Mr. Joly de Fleury, says: "Les évêques et les curés peuvent donc administrer le mariage à celui qui ne croit pas que le mariage soit un sacrement." The appel comme d'abus which brought ecclesiastical proceeding before the common law courts under the old

system, may now be enforced by our prerogative writs of prohibition, mandamus, and quo warranto; a certiorari would suffice to bring them up for review now, before the competent tribunal, that is the Superior Court. The resort to certiorari and mandamus among us, is of ordinary occurrence, in Church matters, such as contestations respecting the building or repairs of churches, the election of church-wardens, &c. From what precedes, I am of opinion that the plea of "clandestinité" is made out, apart from the peculiar circumstances attending the writing to the Bishop by Mr. Ancé; the haste and hurry of the proceeding; the mental and bodily condition of Scott; and the secrecy with which all was carried on, without the knowledge of Appellant and her sister, and even of the attending family physician. 1st. As no marriage took place *in facie Ecclesiæ.* 2nd. As there was no active participation in it by the proper curé. 3rd. As no dispensation has been produced or proved, and therefore, none such is to be taken to have existed. 4th. As no bans were published. 5th. As no marriage rites whatever, and none of the ceremonies of the Church of Rome, or any other church, were performed. 6th. As no licence by the roman catholic Bishop can give validity to the marriage of a protestant, unless it can be accompanied by all the forms and solemnities practised in the Church of Rome, and required by the gallican Church and the Ordinances, Declarations, and Edicts of the King of France, in respect of marriage as a civil contract, as between roman catholic and roman catholic. 7th. As no cohabitation followed the making of the entry in the parish register. The next point to be noticed in this case, is the allegation that the supposed marriage was made in extremis, and is, therefore, inoperative as to civil effects. This depends upon the déclaration of 1639, which, as Pothier says (*Mariage*, nº 429), "prive des effets civils une autre espèce de mariage. Elle porte, article 6: "Voulons que la même peine (de la privation des successions) ait lieu "contre les enfants qui sont nés de femmes que les pères ont entretenues, et qu'ils épousent lorsqu'ils sont à l'extrémité de la vie." He says: *Quoique ce mariage ait été célébré à l'église où cet homme s'est fait porter après la publication ou dispense de bans, et qu'il soit en conséquence valablement contracté,* la loi ne veut pas qu'il ait les effets civils." Nº 430, he adds: "Il faut que ceux qui attaquent ces mariages prouvent deux choses: 1º le mauvais commerce qui a précédé le mariage; 2º que la personne était *in extremis* lorsque le mariage a été contracté. Le mariage est censé contracté *in extremis*, lorsque la personne était au lit, malade d'une maladie qui avait un *trait prochain à la mort quoiqu'elle ne soit morte que quelques mois après.* Un homme qui avait eu

mauvais commerce avec une femme ayant été blessé d'un coup de pied, et l'ayant épousée six jours après, dans un tems où la blessure paroissoit si dangereuse, qu'il reçut l'extrême onction le jour de son mariage; la cour, par arrêt du 28 février 1667, jugea que ce mariage avait été contracté in extremis, *quoiqu'il eût survécu* cinquante quatre jours depuis, et réduisît à des aliments les enfants qu'il avait eus de cette femme. L'arrêt est rapporté au troisième tome, du *Journal des audiences*. Il y a deux autres arrêts rapportés au même tome, l'un du 22 décembre 1672, l'autre du 3 juillet 1674, par lesquels des mariages furent réputés faits *in extremis*, quoique, dans l'espèce du premier, l'homme eût survécu 65 jours; et dans l'espèce du second, 42 jours. In the 1st *Journal du palais*, 326, arrêts du 8 juillet et 5 septembre 1665, it is reported: " M. l'avocat général Talon dit, que selon toutes les apparences François Leriche était malade lorsqu'il contracta son mariage. Il répéta la circonstance de *la permission de se marier quâlibet horâ*. Il dit que, quoique régulièrement à considérer les termes du premier certificat du curé qui avait été livré en bonne forme, on dût présumer *que ce mariage avait été célébré en face de l'Eglise*, néanmoins les circonstances du fait donnaient lieu de croire, *qu'il n'avait pu être célébré qu'en chambre*. Il passa plus avant, car il prétendit que quand même Françoise Leriche n'aurait point été malade, son mariage n'aurait pas laissé de tomber sous la prohibition de la loi, et que l'ordonnance de 1639 se devait entendre, non seulement des mariages contractés dans la maladie par les concubinaires avec leurs concubines, mais encore des mariages par eux contractés avec les mêmes personnes sur le déclin de leur âge, et dans les dernières années de leur vie. Il ajouta que la dispense de publier les trois bans était abusive, et contraire à la même ordonnance de 1639. *Sur quoi est arrivé arrêt conforme à ses conclusions, 22 décembre 1672.* In the second vol. of the *Arrêts* d'Augeard 935, we find an arrêt of the 16 mars 1736, in which it is said, of the party whose marriage was in question: " Il a eu à la vérité assez de force pour se transporter à la paroisse de St-Eustache et y célébrer son mariage, mais on remarque *une précipitation extrême dans la célébration* où l'on a réuni les fiançailles et le mariage, circonstances propres à faire présumer que le sieur Arson qui pouvait tenter une fois se faire transporter dans l'église paroissiale, ne pouvait pas s'exposer à être transporté une seconde fois." Merlin, *Répertoire*, vbo *mariage*, sec. 19, parag. 1, n° 3, p. 47, vol. 8, in-quarto. Le véritable, l'unique cas d'appliquer l'ordonnance, est lorsqu'un homme se marie dans un temps où il se sent frappé de mort, où la violence du mal et l'impuissance des remèdes, lui fait sentir que la vie est prête à lui échapper. All the facts of this case, the precipitation

with which the dispense was sent for, the avowed ground of illness upon which it was urged and given, the dispense as to the uncanonical time when the marriage was to take place, the sick room and bed, the absence of religious ceremonies, the want of notice to the sisters, the previous illness of Mr. Scott and its subsequent aggravation, the state of his mind and his death so speedily following, of the same disease, delirium tremens, as that under which he was laboring when the licence was sent for, these, when taken together, present the strongest case which can be conceived of a marriage *in extremis*, in violation of the declaration of 1639. I am decidedly of opinion, that upon this point the judgment of the court below is erroneous, both as to the fact and the application of the law, and that for this, if there were no other reasons, it ought to be reversed. C'est donc une vérité confirmée par une jurisprudence certaine que l'on a toujours distingué les mariages faits en chambre par un moribond des mariages célébrés en face de l'Eglise même par les personnes infirmes mais qui ayant assez de force pour se faire conduire à l'église ne peuvent être regardées comme à l'extrémité de leur vie, et si on accuse notre morale de relâchement nous avons un garant sûr, dans la jurisprudence qui l'a consacrée dans tous les tems. (4 Cochin, 210. Plaidoyer 95, *in-quarto*). Qu'un homme ait entretenu une femme et qu'il se détermine à l'épouser pour vivre publiquement avec elle, il n'y a rien en cela que la religion ni la loi puissent réprouver, au contraire, l'un et l'autre le sollicitent pour ainsi dire à prendre ce parti. Mais qu'un homme qui a vécu en mauvais commerce rougisse de prendre pour épouse celle qu'il a eue pour concubine, que par cette raison il refuse de l'épouser tant qu'il a espérance de vivre encore quelque tems et qu'il ne s'y détermine que quand il sent que sa honte va être ensevelie avec lui dans le tombeau, alors la loi entre dans ses propres sentimens et refuse après sa mort des honneurs qu'il n'a jamais voulu accorder pendant sa vie. Voir Cochin 108, *in-quarto*. To come lastly to the consideration of the fins de non recevoir set up by Respondents. The court below, by deciding upon the merits, has impliedly determined that they were insufficient to preclude Appellant from her remedy, and, upon this point, and this alone I agree with the judgment. Pothier, *Mariage*, n° 448, says: "Les parens de l'une ou de l'autre des parties qui ont contracté mariage, ne peuvent, à la vérité, tant que les deux parties vivent, attaquer la validité de leur mariage, n'ayant *alors aucun intérêt* né qui puisse les y rendre recevables, mais après la mort de l'une des parties, les parens, même collatéraux de cette partie, sont recevables à attaquer le mariage, incidemment à quelque contestation sur quelque intérêt temporel. Par exemple, les parens

de la partie décédée peuvent revendiquer sa succession contre les enfans, en soutenant qu'ils ne sont pas habiles à succéder et en leur fermant, pour cet effet, la contestation sur la validité du mariage dont ils nés." If the marriage had been impeached alone on the grounds of clandestinité, and as having been made *in extremis* the *fins de non-recevoir* would have had some countenance, but here it is alleged that there has been no marriage at all, no *conjunctio in matrimonium* and no consent to marry, from the mental incapacity of one of the parties, to make any contract at all. No authorities can be produced to show that under such circumstances the lawful heirs and next of kin are precluded from wresting possession of their inheritance from unauthorized hands. The proposition is unreasonable and unnatural upon its very front, when extended to a case like the present. It is again unreasonable, that the children whom claim to be legitimate should place themselves in the position of being heirs presumptive to the Appellant, whom they would claim as their aunt and the sister of their father, without enabling her to contest this capacity on their part. It is said that there has been an acknowledgment of the marriage by the sisters of the Appellant, which binds her, this acknowledgment is made to result from the suit brought by them against the Defendants en declaration de jugement exécutoire. But it is to be noticed that before beginning the suit, to wit on the 22nd June, 1853, by the act of renunciation to their brother's estate, before Gibb and his colleague, notaries, Barbara Scott and Jane Scott declare, as a reason for renouncing, that they are "willing and desirous that their only surviving sister, Ann Scott, should have the full and entire benefit and advantage of the whole of the estate and succession of the said late William Scott, should she see fit to accept thereof," and that they adhere to and enforce all their rights and claims against their brother's estate under their father's will. The children who claim to be legitimate, have only accepted the succession of the late William Henry Scott *sous bénéfice* d'inventaire, and their petition to obtain this benefice is only dated the 29th October, 1853, before that time they had not apprehendé la succession, or made acte d'héritiers; the whole matter was *res integra*. It is also objected to the Appellant that she executed an assignment to her sisters before the same notaries on the 28th June, 1853, of all her right, title, &c., as one of the legatees under the last will and testament of her deceased father, the late William Scott, in to, or upon one undivided third part of that certain judgment, amounting in principal to the sum of £2910 15s 2d, rendered in the Court of King's Bench on the 19th April, 1824, in favor of the said William Scott, the father, against Wil-

liam Scott, the younger, her brother. Now this assignment is made without guaranty, and subject to the condition "It is expressly understood and agreed that nothing contained in the present *act* shall in any wise prejudice the right of the said Ann Scott to claim the estate and succession of her late brother, the late William Scott deceased, one of the Defendants mentioned in the said judgment, nor in anywise affect her title as heir to the said estate and succession, should she see fit to assume the quality of heir to the said estate and succession, and to claim the same, nor shall any liability on her part as such heir be in any manner defeated, altered or impaired by the present transfer." The two sisters claimed to be judgment creditors of their deceased brother, they renounced his succession to enforce their claim, and they sought to enforce it by suing the Appellant as the lawful heir and representative of her brother, and they also sued the children of that brother as heirs in possession, sous bénéfice d'inventaire. Under these circumstances there can be no estoppel of the Appellant's right to question the validity of the marriage, and the authorities cited from Cochin and Le Merle are inapplicable. There is nothing approaching the case where les collatéraux ou autres parents avaient *approuvé et reconnu formellement le mariage*. Every act done by the Appellant and her sisters being expressly declared to be for the purpose of enabling her to claim the estate and succession of her brother as his heiress-at-law.

In conclusion it is to be said, that the importance of this case, in a public point of view, as touching the form of marriage between catholic and protestant, as well as the doctrine of marriage and the marriage tie in Lower Canada, seems to require the more than usually extended observations, which I have thought it necessary to offer. Judgment affirmed.

The present appeal was brought from this judgment of affirmance. It was twice argued. (1)

(1) This appeal was twice argued, first on the 24th, 25th, and 26th of June, 1861, before Lord KINGSDOWN, DR. LUSHINGTON, Sir FREDERICK POLLOCK (The Lord Chief Baron), and Sir JOHN ROMILLY (The Master of the Rolls), but Their Lordships not being satisfied, directed the case to be re-argued. It was stated at the bar that the re-argument was delayed by the poverty of the parties not enabling them to bring it on for hearing.

On the case now coming an application was made by the Counsel for Appellants for the admission of fresh evidence said to have been obtained since the former hearing, relative to the mental capacity of Scott. A petition shortly after the first hearing, had been lodged in the Council office for that object. Respondent's Counsel objected to the affidavit in support of the application being read, or the reception of new evidence after the long delay and Their Lordships were of opinion that, in the circumstances, such an application could not be entertained.

M. GARTH, Q. C., and M. A. T. WATSON, for Appellant: Three questions arise: First, we insist that the marriage has never been celebrated with the forms and ceremonies required by the ancient law of France, in force of Lower Canada, so as to constitute a valid marriage. (The Lord Chief Baron: If there was a marriage *de facto*, it lies on you to show it was invalid in law.) To be valid it ought to have been performed b·· the parish priest: Dagussseau, tom. 5, pp. 150, 151, 152 ; Pothier, *Mariage*, p. 1. ch. 1, n° 3, partie 4, cap. 1, sec. 3, art. 1, par. 5, n° 350 (Ed. 1781); Danty, p. 102; Durand de Maillane, *Dict. can.*, vo *Clandestin*, tom. 1, p. 523, Ed. Lyons, 1770, De Héricourt, *Loix ecclés.*, ch. 5, art. 1, no 27, p. 474. The Respondent's Counsel objected to this point being now raised, as in the declaration Appellants had admitted the marriage and only sought to avoid it as being celebrated when Scott was *in extremis* and unconscious, and submitted that it was not for Respondents to give formal proof of the factum of such marriage; but that if it were necessary the proofs were sufficient according to the provincial statute 35 Geo. III, c. 4, sec. 4, which only requires the presence of two witnesses. This point was not further argued. Second, the evidence of the medical attendants of Scott shews that, a' the time the marriage took place between Scott and Resp nt, Paquet, which was only two days before his death, Sc s *à l'extrémité de la vie*, so as to render such marriage null and void, by the *Ordonnance* of Louis XIII of 1639, art. 6, and the Edict of the year 1697, depriving of civil effect marriages *in extremis*, Pothier, tom. 5, p. 238, partie 5, ch. 2, p. 429; *Ib.*, 239; Merlin, *Rép. de Jur.*, vo *mariage*, tom. 19, sec. 9, art. 3; *Ib.*, tom. 8, sec. 19, par. 1, n° 3, p. 47 (quarto Ed.) Third, the evidence establishes the fact that, at the time of the pretended marriage, Scott was delirious and unconscious from an attack of *delirium tremens* and then incapable of entering into any valid contract. In *Dimes* vs. *Dimes* (1) *The Attorney-General* vs. *Parnther.* (2) *Dew* vs. *Clark* (3) the principles relating to lucid intervals are fully explained, and those authorities shew that the party claiming must establish that fact.

Sir R. PALMER, Q. C., and M. WESTLAKE, appeared for Respondents, but were not called upon.

July 10. Their Lordships' judgment was pronounced as follows:

THE LORD CHIEF BARON: This is an appeal from a judgment by the Court of Queen's Bench for Lower Canada, affirming a decision of the Superior Court of the Province, in

(1) 10 Moore's P. C. Cases, 422. (2) Bro. C.C., 440. (3) 1 Add. Ecc. Rep., 279.

an action brought by Appellant, against Respondents, and in which the question to be determined was whether a marriage between William Henry Scott, deceased, and Respondent, Marie-Marguerite-Maurice Paquet, on the 16th December, 1851, was void. Several questions were raised (but disposed of during the argument) upon the alleged non-compliance with the formalities essential to the validity of a marriage by the law of France which prevails in Lower Canada. The objections to the marriage upon these grounds (which appeared when duly considered to be unsupported by the authorities) were abandoned by the Counsel for Appellant. Two questions alone remain: The first, whether this marriage was contracted while Scott was *à l'extrémité de la vie*, within the meaning of the 6th article of the *Ordonnance* of 1639; the second is whether, at the time when the marriage was so contracted, Scott was of sound mind and in possession of his faculties. Both these questions have been decided in favour of Respondents unanimously by the three Judges of the Superior Court, and by three Judges out of four of the Court of Queen's Bench in Lower Canada. And we think that this court ought not, unless there be manifest error in the judgments under appeal, to overrule these decisions so pronounced in the country in which the law of France, by which the first question must be determined, prevails, and must be known and continually acted upon by the courts of law; and in which also the witnesses on both sides reside and may have been more or less known to or seen when under examination by the judges or some of them, who likewise are familiar with the usages and customs of the place in which all the circumstances which formed the subject of the evidence occurred. The language of the ordonnance is this: *Voulons que la même peine (de la privation des successions) ait lieu contre les enfants qui sont nés de femmes que les pères ont entretenues et qu'ils épousent lorsqu'ils sont à l'extrémité de la vie.* Pothier (No 430) says: " *Il faut que ceux qui attaquent ces mariages prouvent deux choses: 1° le mauvais commerce qui a précédé le mariage; 2° que la personne était* in extremis *lorsque le mariage a été contracté. Le mariage est censé contracté in extremis lorsque la personne était au lit malade d'une maladie qui avait un trait prochain à la mort quoiqu'elle ne soit morte que quelques mois après.* Several causes appear to have been decided upon this Ordonnance, the effect of which is well expressed in Merlin, *Répertoire,* verbo *Mariage,* sect. 19, par. 1, No 3, p. 47, vol. VII, in-quarto: " *Le véritable, l'unique cas d'appliquer l'ordonnance est lorsqu'un homme se marie dans un temps où il se sent frappé de mort, ou la violence du mal et l'impuissance des remèdes lui fait sentir que la vie est*

prête à lui échapper." It seems from this commentary upon the law that the patient must himself feel that he is dying, or that the violence of the disease and the inefficacity of all remedies impress him which the belief that life is about to depart. There is nothing in the evidence to show that Mr Scott thought he was a dying man. Neither Dr. Jamieson nor Mademoiselle Paquet thought so at least, until after the day of the marriage. Dr. Jamieson himself says: " From the beginning of his disease, I expected that he would recover from his disease." " On the first, second and third day, I did not look upon the disease as a decidedly mortal one." " I never conveyed to Scott the idea that he was or might be in danger." And in an other part of his deposition he says: " On the morning of the 17th the Defendant Miss Paquet, inquired of me as to the state of the late Mr. Scott. I informed her that he was in dangerous condition, and she appeared surprised that the disease was at all connected with danger." Besides this law is in restraint of natural liberty, and it must therefore be clear, beyond doubt, that it is applicable to the particular case before a court of justice can hold, to be of force and effect to avoid a marriage. The great question in this case, however, is whether Mr. Scott was in a state of mind, or memory, and understanding, to enable him lawfully to contract marriage. On the one hand, we have the evidence of Dr. Jamieson, who visited him first on the afternoon of the 15th of December, and found him suffering under erysipelatous inflammation in the face, arising as it appears from his having come in contact with a heated stove, while dozing or sleeping in a chair. Strong aperients were administered, and at a later period of the afternoon, the doctor concluded that *delirium tremens* was approaching. At this time he quitted the house in which he resided, with his sister, and proceeded to the house of the Respondent Paquet, shewing signs of great excitement and irritability, with delusions, as he went along. At a later hour he was again visited by the doctor, who remained with him during the greater part of the night, saw him again the next morning, and left him about two in the afternoon, when, as he says, he was labouring under *delirium tremens*, developing itself by mental hallucinations. He then again left him in the house of the Respondent for some hours, and returned in the evening, and from this time until the morning of the 18th, it is asserted he was wholly incapacitated by this disease from doing any act whatever requiring the exercise of his faculties; and on the night of the 18th, he died. If Dr. Jamieson be correct as to the existence of *delirium tremens* and the consequent incapacity of Mr. Scott, although he does not expressly declare that it was impossible he should have been competent to exercise his faculties in a

rational manner, either on the afternoon of the 15th, or during an hour or more on the 16th, it is certainly to be inferred from the whole of his evidence, taken together, that no such intervals of in capacity could have existed, and that it was only during the time necessary to answer one or two questions, or some other short period of tranquillity, that he can be said to have been capable of exercising his reason and understanding. On the other hand we have the testimony of at least three witnesses of unimpeached character, and having no interest whatever in the perpetration of a fraud, or in the misrepresentation or suppression of the truth, who depose to a series of acts done by the deceased, which, if truly narrated and described, prove incontestably that Mr. Scott was during the space of an hour and more, within which the marriage was solemnized and the marriage contract prepared under his instructions and executed by himself, in a perfect state of capacity, memory and intelligence. We may pass by the communication between Ancé, the roman catholic priest, and Mr. Scott, on the afternoon of the 15th, merely observing that the deceased upon this occasion expressed himself rationally while informing the priest of his having had an altercation with his sister, that he was desirous that he should marry him to Mademoiselle Paquet, that he had sent to him for that purpose, and when told that a dispensation was necessary, he desired that a bishop should be written to immediately, in order that it might be obtained. The following day, the 16th, upon the arrival of the dispensation, the priest proceeded again to the house of Mr. Scott, and found him, as he positively swears, in perfect possession of his understanding; and here begins a series of acts on the part of the deceased, which if really done proved to demonstration a state of perfect mental competency and capacity. He received the priest's explanation of the oath or engagement required that his wife should be left to the free exercise of her religion and that the children might be brought up in the roman catholic faith; he observed that at a former period (and in this statement he is confirmed by Mons. Père Martin, the priest) he was about to marry Mademoiselle Paquet, but objected to this engagement, on the ground that he was required to pledge himself that the children should be so brought up, and not merely that he would permit them to use their own free will as to their religion; he gave the necessary information as to the names of his relatives, and the ages of his children, in order that the usual registration should be made; he took the pen in his hand and wrote the name of one of his parents because the priest was unable to spell it; he sent for a notary and his clerk; he gave instructions for the marriage contract

informing the notary that his wife was to be required to give up the *communauté de biens*, and that in consideration of this renunciation, he conferred upon her and her heirs all his immoveable or real estate, which he described as situated in the several parishes of St. Eustache and St. Martin; he gave also to his wife, but in trust only, in equal thirds for two of this sisters, Ann Scott and Jane Scott, and his daughter, by Paquet, Caroline Scott, a large sum of compensation money to which he was entitled by reason of losses sustained in the rebellion of 1837; and besides disposing of the remainder of his property under this marriage contract, it is sworn upon the evidence of Archambault the notary, that upon a suggestion that he should dispose of his property, by will, he himself declared that he had determined to do so by a marriage contract; and the contract was drawn up and executed accordingly. All this, together with the celebration of the marriage itself, is confirmed by the independent testimony of M. Féré, a friend of the deceased residing at St. Eustache. It is impossible, unless these witnesses are guilty of deliberate perjury, that the deceased was at this time otherwise than in perfect possession of his mind, memory and understanding, and of perfect capacity to contract a lawful marriage, It is true that during this proceeding, upon a noise being heard from the agitation of the shutters by the wind, he is proved to have cried out: "They are coming! they are coming!" If this were as suggested by the Respondents, an expression uttered under an idea that the intelligence of the result of his election had arrived, it requires no comment. But if it were, as insisted by the Plaintiff, the manifestation of a delusion created by *delirium* it appears to have been dispelled and to have ceased upon his being convinced, a few moments afterwards. that the noise was occasioned by the wind. We think therefore, on the whole, that whatever degree of suspicion may naturally arise from the very cogent and circumstantial evidence of doctor Jamieson, coupled with the testimony of the witnesses who spoke to the wildness and excitement of his demeanour during certain portions of the three days in question, that all this together is insufficient to outweigh the positive and distinct evidence of so many witnesses to the whole scene of the solemnization of the marriage and the preparation and execution of the marriage contract, or to warrant us in setting aside the united decisions of the Superior Court, and the Court of Queen's Bench in Lower Canada, by which the judgment in favor of the Respondents and now under appeal has been pronounced. Their Lordships will, therefore, humbly report to Her Majesty as their opinion that the jumdgents of the Court of Queen's Bench of Lower Canada

and of the Superior Court ought to be affirmed, and this appeal dismissed. Judgment confirmed. (4 *J.*, p. 149; 11 *J.*, p. 289; 17 *D. T. B. C.*, p. 283, et 4 Moore's *P. C. Rep. N. S.*, p. 505.)

WILDE, REES, HUMPHRY and WILDE, Solicitors for Respondents.

ASHURST, MORRIS and Co., Sollicitors for Appellant.

ENQUETE.

SUPERIOR COURT, Montreal, 30th April, 1860.

Coram BADGLEY, J.

JOSEPH *vs.* MORROW et al.

Held: That a witness cannot be examined a second time by the party producing him in the same case unless allowed by the court on special application.

A witness who had been examined some months before by the Defendants, was again before closing their *enquête* brought up by them to give further evidence. The identity of the witness being established by his examination on *voir dire*, Plaintiff objected to his giving further evidence.

MONK, J., presiding at *enquête*, maintained the objection, holding the examination *de novo* of a witness to be inadmissible unless authorized by the court, upon special application made to that effect. Motion having been made to revise the ruling at *enquête*.

BADGLEY, J., remarked that such right could only be obtained on a special application to the court, stating the particular grounds why such a privilege should be granted. Motion rejected, and the ruling at *enquête* sustained. (4 *J.*, p. 238.)

CROSS and BANCROFT, for Plaintiff.

RICARD, for Defendants.

Case cited of *St. Denis* vs. *Grenier* (6 *R. J. R. Q.*, p. 395.)

SOCIETE.—DECLARATION.

COUR DE CIRCUIT, Montréal, 18 juin 1860.

Coram MONK, J.

SÉNÉCAL *vs.* CHENEVERT.

La déclaration des noms de tous les membres d'une société commerciale, requise par l'acte 12 Vict., ch. 45, doit-elle être faite partout où la société fait quelqu'acte de commerce, ou suffit-il de la faire au greffe de

la Cour Supérieure et au bureau d'enregistrement du lieu où la société a son comptoir et où est le siège de ses affaires ?

Jugé : Que la déclaration au lieu où la société a son comptoir suffit. (1)

Le Défendeur, domicilié à Trois-Rivières, était poursuivi comme actionnaire de la " Compagnie de navigation des Trois-Rivières, " pour le montant de la pénalité imposée par l'Acte 12 Vict., ch. 45, contre ceux, qui, faisant partie d'une société commerciale, négligent de faire, dans les soixante jours, la déclaration du nom de leurs associés, tel que requis par cet acte. Le Demaneeur alléguait que cette compagnie avait fait des affaires à Montréal, et que le Défendeur était passible de l'amende de £50, pour n'avoir pas produit sa déclaration au greffe de la Cour Supérieure et au bureau d'enregistrement, à Montréal.

Le Défendeur a décliné la juridiction de la cour, se fondant sur ce que la compagnie de navigation des Trois Rivières n'ayant pas fait d'affaires à Montréal, il n'était tenu de produire la déclaration exigée par le statut qu'à Trois-Rivières, qui était le siège de ses affaires, que la cause de l'action n'ayant pas originé à Montréal, il n'avait pu être traduit hors la juridiction de son domicile. A l'enquête, il fut prouvé que la Compagnie de navigation des Trois-Rivières avait établi une ligne de communication entre les Trois-Rivières et Montréal, que son bureau devait être à Trois-Rivières, qu'elle y avait ses agents et que les assemblées de la compagnie s'y étaient tenues, qu'elle avait fait naviguer un bateau à vapeur qui avait transporté des voyageurs et des marchandises de Montréal à Trois-Rivières. Le Défendeur prétendait que l'acte qui exige la publication du nom des membres de toute société commerciale avait été passé d'après une loi qui existe maintenant en France, et qui n'était elle-même, que la reproduction modifiée des articles de l'Ordonnance de 1673, sur le même sujet, tombée en désuétude longtemps avant le code : que le but de cette publication était de faire connaître les noms de tous les associés à ceux qui pouvaient avoir des transactions avec la société, et que pour remplir ce but, cette publication n'était nécessaire que là où la société avait un bureau, une maison ou un établissement c'est-à-dire, à l'endroit où elle pouvait être régulièrement assignée, et non pas partout où elle pouvait faire quelqu'acte isolé de commerce. Que la loi française n'exigeait rien autre chose, et que, nonobstant quelque légère différence dans les termes, elle devait servir à l'interprétation de notre statut, l'objet des deux lois étant le même. (1) Le Deman-

(1) V. art. 1834 C. C.

(1) Massé, *Droit commercial*, t. 3, p. 45, No 55. & No. 57, p. 49.
De Langle, *Société com.*, t. 2, p. 15, Nos 729 et suiv.
Goujet et Merger, *vo* Société, Nos 163, 166, 273.

deur prétendait au contraire, qu'il suffisait que la société eût fait quelques actes de commerce, même un seul, à Montréal, pour soumettre le Défendeur à la pénalité imposée par le statut.

Le Juge MONK : Pour interpréter correctement le statut, il faut rechercher le but que la législature avait en vue en le passant, ce but était évidemment de faire connaître à ceux qui pourraient transiger avec une société le nom de ses membres. C'est surtout là où l'assignation peut être donnée, dans les cas de poursuites, que cette connaissance est nécessaire, et c'est aussi au domicile social que la publication doit être faite. Il serait déraisonnable d'exiger l'accomplissement de la formalité de la publication à tous les ports qu'un vaisseau appartenant à une société peut fréquenter, et le statut, en exigeant la publication partout où la société fait des affaires, a seulement voulu dire ce que la loi française explique en d'autres termes, lorsqu'elle dit partout où la société a une maison ou un établissement de commerce. Le Défendeur réside à Montréal, et, si le Demandeur a droit de recouvrer la pénalité qu'il réclame, ce ne peut être que parce que le Défendeur n'aurait pas produit de déclaration à Trois-Rivières même, et ce n'est que là que l'action pourrait être portée. L'exception déclinatoire est maintenue, et l'action déboutée. (4 *J.*, p. 239.)

LAFRENAYE et PAPIN, pour le Demandeur.
ED. CARTER, Conseil.
DORION, DORION et SENÉCAL, pour le Défendeur.
BETHUNE et DUNKIN, Conseils.

COMPETENCE.—DROIT D'ACTION.

QUEEN'S BENCH, APPEAL SIDE, Montréal, 6 septembre 1861.

Before SIR L. H. LAFONTAINE, Bart., Chief-Justice,
AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

SENÉCAL, Appellant, and CHENEVERT, Respondent.

Dans une action de la Cour de Circuit, Montréal, pour une pénalité de £50, pour n'avoir pas enregistré au bureau du protonotaire, à Montréal, un acte de société de la Compagnie de navigation de Trois-Rivières, fait à Trois-Rivières, le Défendeur ayant son domicile à Trois-Rivières, et ayant été cité là, pour comparaître devant la Cour de Circuit à Montréal :

Jugé, en cour inférieure : Sur exception déclinatoire, que la compagnie, ayant le siège principal de ses affaires à Trois-Rivières, n'était pas tenue d'enregistrer à Montréal.

En appel, confirmant le jugement : Que toute la cause d'action doit originer dans le district où l'action est portée, pour donner juridiction à la cour.

Voir le jugement de la Cour Supérieure, *suprà* p. 235.

MEREDITH, Justice : The clause of our statute (Consolidated statutes of L. C., cap. 62, sect. 26), declaring that " any action, " suit or proceeding, may be commenced at the place where " the terms of the Superior Court or Circuit Court are held " in any district or circuit, provided the *cause of such action*, " suit, or proceeding respectively arose within such district or " circuit," is in effect the same as the provision of the english county court act. (9th and 10th Vict., cap. 95, sect. 60), which enacts " that the summons to the Defendant may issue in " any district in which the Defendant, or one of the Defen- " dants shall dwell or carry on his business, at the time of the " action brought, or &c.," or in " which the cause of action " arose : " Under this provision of law, it has been held, by the Courts of Queen's Bench, Exchequer, and Common Pleas, in England, that, by the words " cause of action " are meant the whole cause of action ; and, accordingly, in *Borthwick* vs. *Walton*, (1) where goods were ordered at Oxford, and delivered at Manchester, it was held that the county court judge at Manchester had not jurisdiction, and chief justice Jervis in disposing of that case observed : " It has been decided " over and over again, that ' the cause of action ' in the 9th " and 10th Vict., cap. 95, sec. 60, means the whole cause of " action ; I therefore think the County Court Judge was " wrong in assuming jurisdiction. The whole cause of action " clearly did not arise in Manchester. The mere delivery " of the goods at the railway station there, was not enough. " The Plaintiffs were bound further to prove the order ; and " that was given and received at Oxford. The appeal therefore " (said the learned chief justice) must be allowed." Judge Maule used nearly the same words in concurring in the judg- ment, and added," every thing that is requisite to show the " action to be maintainable is part of the cause of action." Applying the doctrine thus laid down, which appears to me to be perfectly reasonable to the present case, and admitting, for the purpose of the present discussion, that the Defendant was bound to register a declaration of copartnership, as con- tended by the Plaintiff, in the district of Montreal ; still it is proved that the association of which Defendant is a member, was formed or organized in the district of Three-Rivers, a part of the cause of action, therefore, namely : the organization of the company did not arise in the district of Montreal ; and therefore, (without expressing any opinion as to whether a declaration of the alleged copartnership ought or ought not to have been enregistered in the district of Montreal) it seems to me to be plain that the declinatory exception was properly

(1) 15 Com. Bench, 503 ; 80 Eng. C. L., p. 490.

maintained; as the whole of the cause of action did not arise in the district in which the action was brought.

MONDELET, Juge : L'Intimé, Défendeur en la Cour de Circuit à Montréal, et que le Demandeur allègue être un des associés d'une société commerciale non incorporée, et demeurant à Trois-Rivières, est poursuivi pour le paiement d'une pénalité de £50 encourue par le fait qu'il n'y a pas eu à Montréal un enregistrement de la dite société au greffe de la Cour Supérieure, et au bureau du régistrateur, et ce en contravention à la 12 Vict., cap. 45, sec. 1. Il a été assigné de comparaître à la Cour de Circuit à Montréal et a plaidé par une exception déclinatoire. Le mérite est mêlé avec cette exception. Le jugement commet la même irrégularité. Il fallait au préalable statuer sur la question de juridiction. Je suis d'avis distinctement que la Cour de Circuit a bien jugé en déclarant qu'elle n'a pas de juridiction, mais, en confirmant ce jugement, je retrancherais du motivé la partie qui statue sur la question au mérite, c'est-à-dire sur la non-obligation de la société d'enregistrement à Montréal. Il est évident que le Défendeur demeurant à Trois-Rivières ne peut être assigné à Montréal, qu'en autant que la cause d'action a originé à Montréal ; cette pénalité n'est pas ce que l'on appelle une cause d'action résultant d'un contrat, d'une obligation d'un *assumpsit*. Au reste comme il n'est aucunement établi que le siège des affaires de cette société fût à Montréal ; qu'au contraire, il est à Trois-Rivières, ou tout au plus à bord du vapeur *Ottawa*, il s'ensuit que l'assignation n'a pu se faire légalement pour la comparution du Défendeur à la Cour de Circuit de Montréal. Lorsqu'une société a un bureau d'affaires, on fait la signification à ce bureau d'affaires ; si on a à assigner individuellement un de ces associés, on le doit faire pour le contraindre de comparaître dans la juridiction où il demeure, devant ses juges naturels, à moins que la loi n'en ait décidé autrement. Ainsi, dans le cas même où le Défendeur aurait encouru la pénalité pour le recouvrement de laquelle l'action est intentée, il n'en est pas moins vrai, qu'il eût dû être assigné pour comparaître à Trois-Rivières où il demeure. D'après ces raisons, j'opine pour la confirmation du jugement de la cour de première instance.

JUGEMENT : " Considérant que la cour de première instance " a bien jugé, en déclarant qu'elle n'a aucune juridiction sur " la matière en litige, déboutant l'action du Demandeur, con- " firme, &c." (12 *D. T. B. C.*, p. 145, et 6 *J.*, p. 46.)

LAFRENAYE and PAPIN, for Appellant.

E. CARTER, Counsel.

DORION, DORION and SENÉCAL, for Respondent.

CONTRAINTE PAR CORPS.

COURT OF QUEEN'S BENCH, IN APPEAL,

Montreal, 31st May, 1860.

Coram Sir L. H. LAFONTAINE, Bart., Chief Justice, AYLWIN, J., DUVAL, J., MONDELET, J.

WILLIAM BROOKS (Defendant in the court below), Appellant, and NATHANIEL S. WHITNEY (Plaintiff in the court below), Respondent.

Held: That a variance between the final judgment on the rule for contrainte par corps and the terms of the rule is not a ground for setting aside the said judgment.

That a Defendant, who becomes a voluntary guardian of effets seized under a writ of execution is liable to *contrainte par corps* (1).

This was an appeal from a judgment rendered in the Superior Court upon a rule *nisi causa*. Plaintiff obtained a judgment against Defendant for $662 with interest and costs. The sheriff seized certain property under a writ of execution, of which Defendant became voluntary guardian. The sheriff returned that Defendant refused to deliver him up the goods and that thereby he was unable to proceed to their sale. The Superior Court granted Plaintiff a rule *nisi causa*, ordering, " that Defendant be declared to have been in contempt of court, and liable to be *contraint par corps*, and ordering him to be committed to the common jail of the district of St. Francis, until he shall have produced the effects seized, that the same may be sold or until he shall have produced the full value thereof, or until he shall have paid to Plaintiff the amount of the debt, interest and costs in the cause, and the subsequent costs occurred therein." Appellant appeared on the return of the rule, and fyled an answer in writing, objecting that the rule was irregularly issued as he had received no notice of it, and that he could not be legally appointed guardian. The court dismissed the answer, and ordered the value of the goods to be established, *avant faire droit*. The parties went to evidence as to the value, which was admitted by the Defendant, to be $800. The court, on the 30th June, 1859, gave judgment making the rule absolute, in the following terms : " La cour " déclare absolue la règle du 26 mars 1859, et ordonne qu'un " bref de contrainte par corps émane en cette cause pour arrêter " la personne du dit William Brooks, le Défendeur, gardien " nommé des effets saisis en cette cause, et l'incarcérer dans la " prison commune du district de St. Francis, et l'y détenir jus- " qu'à ce qu'il ait payé la dette, intérêt, frais et les frais sub-

(1) V. art. 560, 597 et 875, C. P. C.

“ séquents en vertu du jugement rendu en cette cause le 30e “ jour de décembre 1858, c'est à savoir : la somme de six cent “ soixante et deux piastres de dette, avec intérêt sur icelle, à “ compter du premier jour de juillet 1858, jusqu'au paiement, “ quarante et une piastres et trente-cinq cents de frais taxés “ sur le jugement, trois piastres et trente-trois cents, frais ac- “ crus sur le bref de *fieri facias de bonis*, six piastres et quinze “ cents, frais du shérif sur le bref de *fieri facias de bonis*, et “ enfin les dépens de la règle pour contrainte par corps aux- “ quels dépens la cour condamne le Défendeur mis en cause, “ et taxés par ce jugement à deux louis onze schellings et six “ deniers.”

From this judgment, an appeal was instituted, and the following points were urged by Appellant: That the rule was improperly issued in the first instance, no notice of Plaintiff's application for such rule having been given to Appellant, as required by the rules of practice of the Superior Court. That the condemnation contained in the judgment exceeded the demand of Plaintiff in his motion, and the order contained in the rule, and, in this respect, the court adjudged *ultra petita*, and, thereby, deprived Appellant of the option granted in his favour, viz.: to produce the effects seized, or, in default of so doing, to pay the debt, &c. That, by judgment of the 30th June, Appellant was condemned to imprisonment, until he should have paid, in addition to the debt, interest, costs, and subsequent costs, *the costs of the rule*, which were by the judgment taxed at £2 11s. 6d., a condemnation not sought for by Plaintiff's motion, and not according to the terms of the rule. That the appointment of the *saisi*, as guardian, was illegal, and did not constitute him the *dépositaire judiciaire* of the effects seized, and, therefore, he was not liable to the *contrainte par corps*.(1) The Respondent contended that Defendant as *gardien*, was in contempt of the court, and in bad faith, and had taken advantage of his own act and wrong; that it was competent for the court below, as the sole judge of contempt against itself, to restrain the alternative asked for by the rule, and to condemn Defendant in manner and form as set forth in the judgment appealed from.

MONDELET, Justice, dissented on the grounds that the alternative of producing the effects seized should have been given, that the judgment went beyond the rule, and was untenable.

The court could modify the rule, but could not increase its severity, and grant more than was asked. He would have

(1) Appellant's authorities: Leverson and Boston, 5 *R. J. R. Q.*, p. 446, et seq.; Troplong, *Contrainte par corps*, nos 132, 141, 231, 324, 327.

reformed the judgment and have granted the alternative striking out also all about contempt of the court, the rule being simply a rule for *contrainte*.

AYLWIN, Justice, stated that, if Appellant were an ordinary *gardien*, the alternative to produce the effects would have been granted; here Defendant was made *gardien*, improperly it was true, but he could not allowed to escape from the liability he had assumed.

The Chief Justice: It would have been more regular not to have said anything of contempt of court. Judgment confirmed. (10 *D. T. B. C.*, p. 244, et 4 *J.*, p. 279.)

ABBOTT and DORMAN, for Appellant,

TORRANCE and MORRIS, for Respondent.

CITY COUNCILLOR.—MONTREAL.—DISQUALIFICATION.

SUPERIOR COURT, Montreal, 29th February, 1860.

Coram SMITH, J.

ROLLAND *vs.* BRISTOW.

Held: Under 14 and 15 Vict., cap. 128, ss. 8 and 41, 1° That a party elected to be councillor in the corporation of the city of Montreal, not being possessed to his own use and benefit of real and personal estate within the city of Montreal after payment of his just debts, of the value of £500 currency, is not qualified to be so elected.

2° That a party elected to be such a councillor, and becoming insolvent during his occupancy of said office, is by such insolvency disqualified to hold such office.

The Petitioner by his petition, set out his qualification, as a voter of the St. Lawrence ward, in Montreal, and that, by the statute 14 and 15 Vict., cap. 128, ss. 8 and 41, it is enacted that no one shall be elected a councillor of the city, unless a resident householder within it for a year before his election, and unless he has real and personal property within the city, after payment of his debts, of the value of £500 currency; that he should continue to have such pecuniary qualification during his term of office, and should continue to be a resident householder, and that he should become disqualified if he became insolvent or bankrupt; that Defendant was, on the 28th July, 1859, elected councillor for the city of Montreal, for a term of three years; that he was not, at the time of his election, or afterwards, qualified, not having been a resident householder in Montreal for a year before the election, nor possessed of the property qualification; that, since his election, he had become insolvent and ceased to hold his office; that he illegally assumed to exercise the office of councillor, and the court was authorized to issue a writ

requiring him to shew cause by what authority he assumed to exercise the office. With the petition was fyled a copy of a judgment of the Circuit Court, rendered 13th September, 1859, against Defendant, for £11 7s. 2d., together with copies of writ of execution, in the same case, with a return by bailiff of *nulla bona* against Defendant, the report purporting also to be signed by him, also affidavits by Petitioner and another setting out their belief that Defendant had not the necessary property qualification, had become insolvent, was not at the time of the making of the affidavit a householder, but was living in a boarding-house. Defendant pleaded an *exception à la forme*, which was dismissed. Afterwards Defendant pleaded to the merits, alleging his qualification, that he was not insolvent, and denying the allegations of the petition. The case being inscribed for evidence and hearing, the Petitioner examined the city clerk and another witness who produced the voters, and assessment lists of the city of Montreal extracts from which were fyled, showing that Petitioner's name was on these lists as proprietor of houses in Bleury street; that Defendant's name occurred in the list of 1859 as a tenant and not as proprietor of real estate, that in the voters' list for 1860 Defendant's name did not appear either as tenant or proprietor.

SMITH, J., held that the proof was sufficient to sustain the pretensions of the Petitioner, in the absence of any proof, on the part of Defendant, who was bound to show that he had the right to exercise the office he assumed to hold, the proceeding being in the nature of a *quo warranto*. The judgment was recorded in the following terms: "Considering that Petitioner and Informant hath fully established by legal evidence, the material allegations of the *requête libellée*, and, namely, that, at the time of the election of said William Bristow, to be a councillor for the St. Lawrence ward, for the city of Montreal, to wit, at the election held in the city for the election of a councillor for the said St. Lawrence ward, on the twenty-eighth day of February, 1859, said Informant as Petitioner was a duly qualified elector and voter qualified to vote at the election of a councillor for the St. Lawrence ward, in the city of Montreal, and that said Bristow, was not duly qualified to be elected as such councillor, said Bristow not being possessed, to his own use and benefit, of real and personal estate, within the city of Montreal, after payment or deduction of his just debts, of the value of five hundred pounds currency, and that he hath continued to be so disqualified down to the filing of the information of Petitioner, and that, by reason thereof, said Bristow was unqualified by law to be elected as such councillor. And, further, con-

sidering that it hath been established, by legal evidence, by said Informant, that, since the election and during the occupancy of office of councillor by said Bristow, said Bristow hath become insolvent, and hath, there by become disqualified by law, to hold the office and by reason thereof, hath ceased to hold the office of councillor, as aforesaid, the court doth maintain the petition, and doth declare the election of said Bristow to be and to have been illegal, and doth, further, declare that, by reason of the subsequent insolvency of Bristow, said Bristow, hath, by law, ceased to hold the office of councillor, and, by reason thereof, doth declare the occupation of the office as councillor, for the St. Lawrence ward, to be an intrusion into and a usurpation of the office, and the court doth, accordingly, oust said Bristow from his office of councillor for the St. Lawrence ward, in the city of Montreal, and doth exclude said Bristow from the exercise of the functions of said office. (4 *J.*, p. 281.)

H. Stuart, for Petitioner.

Devlin, for Defendant.

OPPOSITION A FIN DE CONSERVER.

Superior Court, Montreal, 26th February, 1859.

Coram Badgley, J.

Ramsay *vs.* Hitchins, *and* Ramsay, Opposant, and Divers Opposants.

Held : That an opposition *à fin de conserver* will not be received, after the delay has expired, although before the homologation of the report of distribution, so far as to disturb the rights of parties already collocated, where the omission to fyle it in time is not attributable to the negligence or oversight of the attorney, but such opposition will be received, so far as to give the new opposant the moneys not distributed. (1)

The sheriff had levied of the land of Defendant £206 15s 8d and, making his return accordingly, Plaintiff put in an opposition for the amount of the judgment. Another party opposant put in his chirographary claim of £32 11s 11d. for goods sold and delivered. A report was prepared [illegible] the money proposed to be distributed, according to [illegible] claims, and there remained a sum of £32 16s. 11d. to be returned to Defendant. This report was affixed and posted up, agreeably to the rules of practice of the court, on the 27th December, 1858. On the first day of next term, Plaintiff made a motion, supported by affidavits, to be permitted to fyle another opposition for the *bailleur de fonds* claim of £322 10s. 0d.; that the

(1) V. art. 720 C. P. C.

report of distribution already prepared be set aside, and a new report ordered to be prepared, according to the oppositions then fyled including the new opposition.

TORRANCE, for Plaintiff and Opposant Ramsay, cited the case of *Woodman* vs. *Letourneau* and *Letourneau*, Opposant, 7 *R. J. R. Q.*, p. 347, in support of motion.

PER CURIAM: The facts shew negligence in Plaintiff in not placing in the hands of his attorney the papers necessary to prepare the opposition now sought to be fyled, but none on the part of his attorney. I will not, therefore, admit the opposition, so far as to disturb the right of parties already collocated, but the report shall be reformed, so far as to give Plaintiff the sum of £32 16s. 11d., not distributed. Motion granted in part. (4 *J.*, p. 285.)

TORRANCE and MORRIS, for Plaintiff and Opposant.

R. MACDONNELL, for Opposants, GAULT et al.

OPPOSITION.—CONTESTATION AFTER DELAY.

SUPERIOR COURT, Montreal, 23rd June, 1860.

Coram BERTHELOT, A. J.

CLAPIN *vs.* NAGLE, *and* CLAPIN, *and* NAGLE and others, Opposants.

Held: That a party opposant will be allowed to contest a report of collocation and distribution after the delays have expired, upon cause shewn, by affidavit, that the party is interested, and that the party collocated to his prejudice appears, on examination of his opposition, not to be entitled of the amount of his collocation. (1)

The sheriff of the district of St. Hyacinthe returned that he had levied of the lands of Defendant, a sum of £470 13s. 11d. The Plaintiff and John McGinnis were Opposants for certain sums, and were both collocated ratably for a certain sum which was divided between them by a report of collocation and distribution fyled on 12th May, 1860. The time for contesting the report had elapsed when Louis-Antoine Dessaulles, as in the rights of Plaintiffs, gave notice, on the 25th May aforesaid, to the attorney of Opposants McGinnis, that he would move the court, on the 18th June then next, to be allowed to fyle a contestation of the report, as regards the collocation in favour of McGinnis, founded upon the affidavit of Dessaulles, in the following words: "That he has the rights of the Plaintiff and Opposant; that he is also an Opposant; that deponent, only on the 23rd of this month, examined the

(1) V. art. 720 C. P. C.

report of distribution prepared, and found that Opposant McGinnis had been collocated to the prejudice of Clapin and deponent; that deponent did not give the matter attention sooner, being under the impression and belief that H. W. Austin, advocate of Montreal, had undertaken to watch said report for him, and to contest McGinnis' opposition should he be collocated; that deponent's absence from Montreal, on public business, he being a member of the Legislative Council, prevented him giving the matter his personal attention, until the delay fixed by the rules of practice of this court had expired; that deponent believes the opposition of McGinnis to be unfounded. That, should the report of collocation stand in its present form, deponent will suffer great loss and damage." The motion was made.

PER CURIAM: Having looked at the affidavit, and also at the opposition of McGinnis, I allow Plaintiff to fyle his contestation, on payment of 11s. 8d. of costs. (4 *J.*, p. 286.)

MACKAY and AUSTIN, for Plaintiffs.

M. DOHERTY, for McGinnis.

Vide contrary decision, FORSYTH *vs.* MORIN and Divers Opposants; 6 R. J. R. Q., p. 352.

PRESCRIPTION.—IMPUTATION DE PAIEMENT.

SUPERIOR COURT, Montreal, 31st March, 1860.

Coram SMITH, J.

TORRANCE *vs.* PHILBIN.

Held: 1° That payment, on account of a promissory note, within five years, interrups the statutory prescription, notwithstanding no action brought within that period. (1)

2° That, where there was a book account and also a promissory note, and accounts stated had been rendered, including both and charging interests, the court will not strike off the interest where the Defendant had not pleaded an imputation of his payments as against the note. (2)

Plaintiff claimed of Defendant, $\$206\frac{27}{100}$, as the balance of a promissory note made in 1852. The declaration also contained the commoun counts, for goods sold and delivered. The Defendant pleaded the statutory prescription of five years to the action, in so far as founded on the promissory note, and that of six years, to the account for goods sold and delivered. Plaintiff replied, that, though no action had been brought within 5 or 6 years respectively, yet the prescription had been interrupted by payments on account. Such payments were

(1) V. art. 2227 C. C.

(2) V. art. 1161 C. C.

proved by testimony and admitted, on answer to interrogatories *sur faits et articles* by Defendant. Defendant, however, claimed to impute his payments as against the note, so as to extinguish the interest running upon that security. At the argument, the counsel for Defendant, abandoned the pleas of prescription, admitting the interruption. With regard to the imputation, it was held by the court, that imputation not having been pleaded by Defendant, that question did not arise, and the court would not interfere, the only evidence in the record being the accounts fyled by Plaintiff by which the balance was shown, and which had been proved to have been rendered to Defendant. Judgment accordingly was given for the full amount claimed. (4 *J.*, p. 287.)

A. MORRIS, for Plaintiff.

MACKAY and AUSTIN, for Defendant.

SALE.—REDHIBITORY ACTION.

SUPERIOR COURT, Montreal, 31st May, 1860.

Coram SMITH, J.

JOSEPH *vs.* MORROW et al.

Held: That, when there is a sale by sample and the goods do not agree with it, the vendor must make known the defect within reasonable delay: he could not claim to rescind the sale, and return the goods, after a delay of six months. (1)

Plaintiff brought his action, for the amount of a note for $300, being one of three notes given for a purchase of brandy and Port wine. Defendants, for their plea, alleged that the sale of the brandy was by sample, with which, on examination, it was found not to agree; that the notes in question had been given before the brandy was examined, and that the defect was not discovered until afterwards, when they gave Plaintiff notice that the note could not be paid, and that they were willing to return the brandy. Evidence was adduced by Defendants to establish that the brandy did not correspond with the sample, but the judgment turned upon the want of diligence shown by Defendants, in allowing some six months to elapse before making known their pretention. It appeared, by the evidence of Woods, Plaintiff's clerk, and others, that, in March, 1858, Woods met Defendants together, in the street, and told them that Plaintiff had some brandy which he could sell at a low price; that, at their request, he afterwards took a sample of the brandy to them, and that, on

(1) V. art. 1530 C. C.

calling upon them, some days after, he concluded a sale of twelve hogsheads, at five shillings per gallon, at an unusual credit of six, twelve and eighteen months. Seven of the hogsheads were delivered immediately, the others remained in Plaintiff's store, at the request of Defendants, A few days after the delivery of the seven hogsheads, Woods called and got the notes. The brandy was then lying in a yard occupied by Defendants and others in common. The brandy, after lying in the yard for some days, was put in the cellar of Defendants when several casks were opened, and samples of some of them were shewn to Morrow, one of Defendants, by his clerk Balfour. No complaint was made, except that, two or three months after the sale, Morrow mentioned to Woods that the brandy was muddy. Some time afterwards, Morrow proposed to Woods to keep the five hogsheads, which had not been delivered, and to cancel one of the notes; it was not until the first note came due, after the lapse of six months, that any complaint was made that the brandy was not according to sample, and this ground was not taken, nor any disposition shewn to cancel the sale, until Plaintiff had refused to take payment of one half the amount of the first note, and to renew for the rest of it, when Defendants claimed to cancel the claim on the ground that the brandy was not according to sample, and notified Plaintiff that they were ready to returnit.

SMITH, J.: The only point in the case is whether Defendants could keep the brandy six months, and this, although, by the evidence of their clerk, it had been examined a short time after its receipt, and then, when the note which was given for it became due, complain that it was not according to sample, this could not be done. Defendants should have tendered back the brandy immediately, so as to give Plaintiff an opportunity to verify the alleged variance. The case of *Stuart* vs. *Demontigny*, cited by Defendant's counsel, only confirms this view. The Plaintiff must have judgment. (4 *J.*, p. 288.)

CROSS and BANCROFT, for Plaintiff.

RICARD, for Defendants.

APPEAL BOND.

COURT OF QUEEN'S BENCH, Montreal, 31st December, 1859.

Coram MONK, J.

CHAURETTE *vs.* RAPIN *et al.*, and RAPIN *et al.* (Plaintiffs *en garantie*), and LORANGER (Defendant *en garantie*).

Held : That the securities on an appeal are not bound for the condemnation money, when the Appellant files a declaration to the effect that the judgment appealed from can be executed; although the appeal bond has been given in the usual way. (1)

MONK, J.: Action on security bond, in appeal. In a cause of *Chaurette* vs. *Cousineau*, judgment was rendered in the Superior Court, at Montreal, on the 23rd September, 1856, condemning Defendant Cousineau to pay £117 3s. 4d. On the 22nd October, 1856, nearly a month after this judgment, Defendant Cousineau, by his attornies, filed a declaration, at the prothonotary's office, consenting that execution should issue in due course, notwithstanding the appeal he was about to take from the judgment rendered against him. Upon this, it would appear, execution issued. At least, the fiat is produced, dated 3 days after the production and fyling of this declaration, and the fact is admitted by Plaintiff in his answer to Defendant. On the 25th February, 1857, a writ of appeal was taken out, and, on the 5th March, 1857, security in appeal was entered by Cousineau, Rapin and Garrick; the present Defendants became bound as such security, not only for the costs in appeal, but also for the condemnation money, costs and damages. In fact the bond is in usual form. The appeal was prosecuted, and, on the 4th December, 1857, the judgment of the court below was confirmed in appeal. The present action is brought upon the bond, for the condemnation money, and the costs of both courts. Defendants plead, that the bond of the 5th March, 1857, was consented in error. That Respondents exacted security for costs in appeal only, seeing that a consent was fyled by Defendants to the execution of the judgment, notwithstanding the appeal, and that execution had issued in consequence. Plaintiff answers that the consent was not a valid consent, and that, although he did take out execution, the consent, such as it was, was revoked by Defendant Cousineau filing an opposition to the execution of the writ of execution, based upon the ground that he had appealed from the judgment. Of this opposition, the court has no proof; no copy of it is filed, nor is there evidence of it *aliunde*. Having consented to the execution of the judgment in the court be-

(1) V. art. 1122 C. P. C.

low, Cousineau was bound to find security for costs in appeal, and for these costs only. The law required so much of him and no more, this was the utmost extent of his obligation. His securities have gone further than he was bound to go, in the special circumstances of this case. They have become bound for debt, interest and the costs of both courts. There is no proof whatever to show that the securities were aware that a consent had been given, and that execution had gone out. In the absence of such proof, we must presume ignorance of this important fact, on the part of the securities, and if ignorance, the law justifies the court in assuming that there was error. The knowledge of that fact was of the highest importance to the securities, and their ignorance of it involves a very serious error of fact. The law, as to what extent of error, will involve the nullity of an obligation may be thus stated. " Pour qu'une erreur entraîne la nullité d'une convention, il faut qu'il soit moralement certain que, si la vérité avait été connue, la partie qui réclame contre l'obligation ne se serait point engagée." In this instance, it is not going too far to say that we have this moral certainty. The court is, therefore, of opinion that error is a good defence. Besides, we may invoke another principle here equally urgent and decisive of this case. The obligation of the principal here was to find security for costs in appeal. The judgment for the debt and the costs of the court below was being enforced by execution, at the time security was given. To become security for a judgment debt, or for any liquidation by execution, is certainly unusual, and the law wisely provides that such a preposterous anomaly should be avoided by declaring that security for costs in appeal is all that can be required or exacted in such a case. This was the full extent of Cousineau's obligation, and it was his obligation to pay the costs of appeal to which the security was to apply, and which it was intended they should guarantee. It is a well known maxim of the law, "*qu'il est de la nature du cautionnement de n'avoir plus d'étendue que l'obligation pour laquelle il est donné; de sorte qu'on ne peut pas plus exiger de la caution que du débiteur principal*," upon the whole case, in applying these principles to the facts proved, the court is of opinion that judgment should go against the securities for the costs of appeal only.

JUDGMENT: "La cour considérant que l'acte de cautionnement, en date du 5 mars 1857, fut consenti par erreur, de la part des Défendeurs, quant à toute somme excédant le montant des frais encourus en appel, c'est-à-dire, trente livres courant, tel qu'établi par la preuve produite; considérant qu'au lieu de donner caution pour le montant de la condamnation, frais et dommages, tel que porté dans le dit acte de cautionne-

ment, les Défendeurs entendaient et devaient donner cautionnement pour les frais d'appel, maintient l'exception produite par les Défendeurs dans la cause principale. Et, faisant droit sur la demande principale, condamne les Défendeurs, conjointement et solidairement, à payer à la Demanderesse la somme de £30 0s. 0d., montant des frais sur l'appel interjeté par Louis Cousineau, du jugement rendu par cette cour, le 23 septembre 1856, dans une cause No 1154, dans laquelle la Demanderesse actuelle était Demanderesse, et Cousineau était Défendeur, lequel jugement, du 23 septembre 1856, a été confirmé par la Cour du Banc de la Reine, jugeant en appel le 4e jour de décembre 1857, laquelle somme de £30 0s. 0d., la Demanderesse a droit de recouvrer des Défendeurs, et ce, par et en vertu de l'acte de cautionnement du 5 mars 1857, avec intérêt, à compter du 23 novembre 1858, jour de l'assignation jusqu'au parfait paiement. Et la cour, adjugeant sur la demande en garantie, condamne le Défendeur en garantie à garantir et indemniser les Demandeurs en garantie de la présente condamnation prononcée contre eux en faveur de Marguerite Chaurette, à raison du susdit cautionnement. (4 *J.*, p. 293.)

L. BÉLANGER, Avocat de la Demanderesse.
DOUTRE, DAOUST et DOUTRE, Avocats des Défendeurs.
J. M. LORANGER, Avocat du Défendeur en garantie.

CURATOR TO AN ABSENTEE.—COSTS.

SUPERIOR COURT, Montreal, 24th November, 1855.

Coram DRISCOLL, A. J., Pelletier, A. J.

WHITNEY *vs.* BREWSTER.

Held: That a curator to the estate of an absentee who contests and defends, is *personally* liable for the costs of Plaintiff's action. (1)

Plaintiff, a creditor, by his suit, called upon Defendant, in his capacity of curator to the estate of W. W. Janes, an absentee, to render to him, as a creditor of the estate, an account of his gestion, and concluded for costs against Defendant personally, if he contested, Defendant having contested by the judgment of the court, was condemned to render an account, and also personally to pay the costs of the action. (4 *J.*, p. 298.)

MORRIS and LAMBE, for Plaintiff.
ROSE and MONK, for Defendant,

(1) V. art. 91 C. C.

FORECLOSURE.—PLEADINGS.

SUPERIOR COURT, Montreal, 20th June, 1860.

Coram BERTHELOT, A. J.

MOLSON *et al.* *vs.* REUTER *et al.*

Held: That the pleas fyled by a Defendant half an hour after foreclosure from pleading entered by the prothonotary, will not be rejected on motion to that effect made by the Plaintiff, though the latter support his motion by an affidavit that the Defendant has no defence to his action, and that the pleas are sham pleas, and though the Defendant do not resist the motion by counter affidavit to the effect that his pleas are *bonâ fide* fyled. Motion dismissed. (4 *J.*, p. 299.)

E. CARTER, for Plaintiffs.
JOHN MONK, for Defendants.

TIERS-SAISIE.—CONTESTATION.

SUPERIOR COURT, Montreal, 31st December, 1859.

Coram BERTHELOT, A. J.

CONSTABLE et al. *vs.* GILBERT et al., and SIMPSON et al., Tiers-Saisis

Held: That a Defendant has no interest in contesting the declaration of a *Tiers-Saisi*, on the ground that the goods of such *Tiers-Saisi* are under seizure, for the amount admitted by him in his declaration to be due to Defendant, and that such a contestation will be dismissed on demurrer fyled by the *Tiers-Saisi* himself.

This was a hearing on law, on the issue raised by the demurrer, fyled by George N. Albright, one of the *Tiers-Saisis*, to the contestation fyled by Defendant, Charles S. Burroughs to the declaration of said George N. Albright, as such *Tiers-Saisi*. Albright, by his declaration, admitted he owe Burroughs a certain amount for which the latter had recovered a judgment against him. Burroughs contested this declaratien on the grounds that, before and at the time the attachment was served, Albright's goods were actually under seizure, under an execution issued on said judgment. The *Tiers-Saisis* demurred to the contestation, on the ground that Defendant had no interest in raising such a contestation, and that the same was wholly unfounded in law. The court maintained the demurrer, and dismissed the contestation, and assigned the following *motif:* "Considérant que le Défendeur est sans intérêt à soulever la dite contestation, et qu'elle est d'ailleurs mal fondée en droit, a débouté la contestation." (4 *J.*, p. 299.)

CROSS and BANCROFT, for Defendant Burroughs.
ABBOTT and DORMAN, for Albright, Tiers-Saisi.

FOREIGN PLAINTIFF.—SECURITY FOR COSTS.

SUPERIOR COURT, Montreal, 19th September, 1860.

Coram BERTHELOT, J.

MANN et al. *vs.* LAMBE.

Held: That a foreign Plaintiff will be permitted to give security for costs by deposit of a sum of money. (1)

Plaintiffs, who were resident in England, impleaded Defendant in this court. Defendant moved the court that Plaintiffs should give security for costs, and that proceedings should be stayed untill such security was given. Thereupon, Plaintiffs moved the court, that, in lieu of giving security, they should be allowed to deposit, with the prothonotary, such sum of money as the court might see fit to fix. The motion of Plaintiffs was granted, and a deposit of £50 currency ordered in lieu of such security. Motion granted. (4 *J.*, p. 300.)

E. BARNARD, for Plaintiffs.

TORRANCE and MORRIS, for Defendant.

ATTORNEY AT LAW.—SUBSTITUTION.

SUPERIOR COURT, Montreal, 28th February, 1861.

Coram BERTHELOT, J.

MANN *et al. vs.* LAMBE.

Held: That a substitution of new attornies, in a cause, will not be granted, unless there be a full revocation of the authority of the attorney of record. (2)

This was a motion for the substitution of other attornies instead of the attorney of record, on the ground of revocation of his authority. In support of the motion, there was fyled a revocation executed before a notary, in Montreal, by one only of the three co-Plaintiffs, the others being resident in England. The court, in giving judgment dismissing the motion, said that the constituent had the right to change his attorney in a cause. This right was a summary and peremptory one, but, because it was so, it ought to be duly exercised, and be a full revocation. In this case, there was not a revocation by all the parties. Two of the joint Plaintiffs were not parties to the *acte*, which was executed by the third, who claimed to act on his own right, and also as the special agent and attorney of

(1) V. art. 29 C. C.

(2) V. art. 206 C. P. C.

the other Plaintiffs, but all should have concurred in the revocation. Motion dismissed. (5 *J.*, p. 98.)

CROSS and BANCROFT, moving for substitution.
E. BARNARD, for Plaintiff.
J. J. C. ABBOTT, Counsel for Barnard.
TORRANCE and MORRIS, for Defendant.

TRIAL BY JURY.

SUPERIOR COURT, Montreal, 30th November, 1861.

Coram BERTHELOT, J.

MANN *et al. vs.* LAMBE.

Held: That an action *en reddition de compte* between the representatives of two successions is not susceptible of trial by a jury. (1)

PER CURIAM: Plaintiffs have submitted a motion praying that *acte* be granted them of their option that the cause be tried by a jury. The action is the *action en reddition de compte,* brought by the representatives of one succession against the heirs of another. The court is of opinion that the statute does not apply to the case and that the action is not susceptible of trial by a jury. Motion refused. (2) (5 *J.*, p. 330.)

CROSS and BANCROFT, for Plaintiffs.
TORRANCE and MORRIS, for Defendant.
R. MACKAY, Counsel.

APPEAL.—TRIAL BY JURY.

COURT OF QUEEN'S BENCH, Montreal, 5th March, 1862.

Coram Sir L. H. LAFONTAINE, Baronet, Chief-Justice.
AYLWIN, DUVAL and MONDELET, Justices.

WILLIAM MANN *et al.* (Plaintiffs in the court below), Appellants, and WILLIAM B. LAMBE (Defendant in the court below), Respondent.

Held 1. That the court will reject a motion for a rule to obtain a writ of appeal from an interlocutory judgment, if the court be against the moving party on the merits of his application, (3)

(1) V. art. 348 C. P. C.

(2) A motion to revise this judgment was made before Mr. Justice BADGLEY, bot rejected, on the 30th of December following, the court holding, the judgment to be correct.

(3) V. art. 1119 C. P. C.

2. That, where two causes of action are combined in one suit, the one commercial and the other non-commercial, the action is not susceptible of trial by jury. (1)

3. That an action *en reddition de compte* is not referable to a jury.

Appellants, as Plaintiffs in the court below, in their respective capacities of executors and universal legatees, under the will of the late James Hutchinson, merchant, brought their action against Defendant, whereby they prayed that Defendant, as heir at law and universal legatee of James H. Lambe, of Montreal, merchant, be condemned to render an account of all goods, wares, and merchandises received by the late James Henry Lambe, from the firm of Spragge and Hutchinson, on the 21st day of June, 1825, and an account of all other monies received by said Lambe, as agent of said Hutchinson, from 1826 to 1848. The declaration set forth the qualities of the parties and contained two distinct *chefs*. The 1st alleged, that the late James Hutchinson was in copartnership with William Hutchinson from 1812 to 1825, and that the copartnership consigned to Spragge and Hutchinson goods of the value of £51 000, for sale on their account; that the copartnership was dissolved on the 1st of January, 1825. That, on the 21st of June, 1825, Spragge and Hutchinson had goods of the value of £5246, 7cy, still unsold. That the accounts between the two firms were settled by arbitration, and certain goods specified in the award were assigned to James Hutchinson, in charge of the indebtedness of Spragge and Hutchinson. That a writ of *saisie-arrêt* was issued, at the suit of Robert Gillespie and other creditors of Spragge and Hutchinson, into the hands of J. H. Lambe, and that he declared that he had goods of the value of £5300, which he had received for sale from Spragge and Hutchinson. That a long litigation ensued the steps of which were recited, and eventually, by a decree of the privy council, these goods were declared to be the property of James Hutchinson (2) and that Lambe had promised to account to James Hutchinson for these goods apart from such legal proceedings. The declaration secondly alleged that, during the pendency of said contestation, Lambe had acted in Canada as the agent of James Hutchinson, not only in all matters relating to said contestation, but also in all the other business of Hutchinson in Canada, and had received monies from 1826 to 1848, for which he had promised to account.

The pleas were prescription, and already accounted, and also that a sum of £5000 had been deposited in court, by

(1) V. art. 348 C. P. C.

(2) Vide 2 *R. J. R. Q.*, p. 313.

J. H. Lambe, as *Tiers-Saisi*, by order of the court, being the proceeds of said goods, and that Plaintiffs, by moving to obtain the same and otherwise, had acquiesced in such deposit. In the Superior Court, Plaintiffs moved for *acte* of their option of a trial by jury, but their motion was rejected by Mr. Justice BERTHELOT, and a motion to revise the judgment was also rejected by Mr. Justice BADGLEY. V. *supra*, p. 254. Plaintiffs, having moved, under the 26th section of the act of the consolidated statutes of Lower Canada, chapter 77, for a rule upon Defendants, to shew cause why a writ of appeal should not be granted from these interlocutory judgments, the motion was rejected by the court, and the rule refused—, Mr. Justice AYLWIN dissenting, Mr. Justice AYLWIN, said, in substance, there were two reasons why he thought Plaintiffs ought to have succeeded. 1st. They could only obtain a remedy by appealing from the interlocutory judgments, and the court ought to grant the motion and permit the appeal thereby testing the question of right. The question was simply this, did the judgment fall within the three classes specified in the 26th section of the act, cap. 77, of the consolidated statutes of Lower Canada? But, secondly, the case unquestionably fell within the class of cases triable by a jury, and the declaration manifestly disclosed a *demande* of a commercial nature. The pleas of Defendants were moreover applicable to a commercial cause. But it would be said that there was an inconvenience in referring an action of account to a jury. But in questions of jurisdiction, the argument *ab inconvenienti* was not one that could be entertained. He was of the opinion that the rule should be granted. Mr. Justice MONDELET said, in substance, the application for a trial by jury in this cause, was an anomalous proceeding, inasmuch as two distinct *chefs* or causes of action were commingled, the one of a mercantile character, and the other of a non-commercial character. Should the latter part of the cause go to the jury? Certainly not. But should the other part of the action be referred to a jury? Yes, if it had stood by itself, but not as now presented to the court. A similar decision had already been given in the Superior Court, in a case where an action *en déclaration de paternité*, and in damages were combined, and the trial was property refused. *Clarke* vs. *McGrath*, 5 *R. J. R. Q.*, p. 362. A part of the case could not be sent to jury. His Honor, the dissenting judge, says, that at all events, the appeal should be allowed. But of what benefit would that be? It would be to grant the writ with the intention of dismissing the appeal hereafter. The rule must be refused. Mr. Justice DUVAL, said in substance, it was the invariable practice to deny the appeal, if the court was against the application on the merits. It had already been so decided in the case of *Gugy* vs. *Stevenson*.

With regard to the case in question, the action was one of account, and he had never heard of such an action being brought before a jury in Lower Canada, nor did he see how it could be. In England the action of account at common law was obsolete, owing to its inconveniences. The first judgment in such a cause was there, that of *quod compulet.* With reference to the english action of account, the learned judge referred to *Archer* vs. *Pritchard*, 3 Dow. & R., 596, and 2 Chitty's Reports, p. 10, *Smith* vs. *Smith.* Was it pretended that two juries were to be impanelled in this cause, the first to ascertain if an account was due, and another after the *débats and soutenements were fyled ?* The fact was, that the party who sought to bring such an action before a jury, would be thought likely to have a very bad case. Moreover, the objection taken by judge MONDELET was quite conclusive, as part of an action could not be referred to a jury. Motion dismissed and appeal refused. (6 *J.*, p. 75.)

CROSS and BANCROFT for Appellants.

TORRANCE and MORRIS for Respondents.

PROCEDURE.—AMENDEMENT.

SUPERIOR COURT, Montreal, 3rd October, 1862.

Coram BADGLEY, J.

MANN *et al.* *vs.* LAMBE.

Held : That, when a Plaintiff, pending his *enquête*, has obtained a judgment of the court permitting him to amend his declaration, he will not be allowed to proceed further with his *enquête*, until he has amended his declaration, and the Defendant has been allowed to plead *de novo.*

The Plaintiffs obtained a judgment of the Superior Court in their favour, permitting them to amend their declaration on payment of costs. They now applied to the presiding judge at the *enquête* sitting to be allowed to proceed with their *enquête.* Torrance, for Defendant, resisted the application on the grounds that Plaintiffs should first amend their declaration, and then give Defendant an opportunity of pleading *de novo* to the amended declaration, if he should see fit, or that Plaintiffs should fyle a *désistement* of their right to amend. Cross, *e contra*, contended that he had a right to proceed at once, without waiver of his right to amend and cited 1 Petersdorff's suppl., p. 169, *Collins* vs. *Aaron*, 5 Scott, 595, to the effect that, in England, a Defendant had no right to plead *de novo,* unless it formed part of the judge's order. The presiding judge ruled against Plaintiffs and remarked that, by the

practice of the court, Defendant would be permitted to plead *de novo*, after service upon him of the amended declaration. Application refused (6 *J*., p. 301.)

CROSS and BANCROFT, for Plaintiffs.

TORRANCE and MORRIS, for Defendant.

TENDER.

SUPERIOR COURT, Montreal, 29th September, 1860.

Coram BADGLEY, J.

BOUCHER *vs.* LEMOINE et al.

Held: That the tender of principal and interest after issue of writ of summons, though before service of writ, is bad unaccompanied by the costs of an action before return. (1)

Defendants were served with the writ and declaration, demanding a sum of money in this cause according to the return of the baillif, on the 24th November, 1859, between the hour of four and six in the afternoon. Two of the Defendants pleaded a tender of principal and interest, but without costs, made by another, the principal Defendants, about half past four the same day to Plaintiff.

BADGLEY, J., held that the writ and declaration having already been prepared and issued the tender of the principal and interest without costs was unsufficient. (4 *J*., p. 300.)

LEON DOUTRE, for Plaintiff.

H. Stuart, for Defendant.

ACTION TO ACCOUNT.

SUPERIOR COURT, Montreal, 31st May, 1854.

Coram SMITH, J., MONDELET (C.), J.

CUMMING *vs.* TAYLOR.

Held: That in an action to account, where Defendant pleaded that he had previously accounted, and fyled with his pleas copies of his accounts alleged to have been previously rendered, and the issues were so joined, Plaintiff cannot fyle *débats de compte*, until the said issues shall have been previously decided, and that the *débats de compte* fyled by Plaintiff, may be rejected by motion on the part of Defendant to that effect.

The action of Plaintiff was to obtain from Defendant an account of his gestion of Plaintiff's affairs, and investment of cer-

(1) V. art. 1162 C. C.

tain monies of Plaintiff by Defendant, as his agent and attorney, to wit, from the 17th January, 1845, to the 1st July, 1850. The Defendant pleaded in substance that Defendant, from January 1845 to the 1st July, 1850, did act as the friend and gratuitous agent of Plaintiff, and sold for Plaintiff bills of exchange on the Hudson's Bay Company, and made investments for, and paid over interest on the same to Plaintiff, and, in each and every year, during said period, from 1845 to the 29th May, 1850, Defendant did exhibit and deliver to Plaintiff a statement and stated account in writing of the moneys aforesaid, and did fully account for the moneys so received by him to wit, on the 28th day of January, 1846, on the 10th June, 1846, on the 2nd July, 1847, on the 30th May, 1848; and 29th May, 1850; that each and every of the said statements and stated accounts show and exhibit the real and exact balance, and were severally and respectively correct, just and true; and Plaintiff admitted and approved thereof; all which Defendant was ready to verify, prove and maintain, and Defendant averred that, from the 29th May, 1850, when the said stated account was so furnished and delivered to Plaintiff, up to the 1st July 1850, no transactions of any kind took place between Plaintiff and Defendant; that, from the year 1845 to the 1st July, 1850, Defendant did, at the special instance and request of Plaintiff, act as the friend and gratuitous agent of Plaintiff, and did, during that period, at the request of Plaintiff, put out and place at interest divers sums of money, for and on account of and to the use of Plaintiff, and did receive and take documents and vouchers for such monies, on behalf of Plaintiff, and with his knowledge, consent, acquiescence, and approbation, and did, from time to time, well and truly and faithfully account to and with Plaintiff for all such moneys to his entire satisfaction, and did exhibit and deliver to him, at divers times, statements and stated accounts thereof; that, on the 29th May 1850, Defendant, at the special request of Plaintiff, did deliver to Plaintiff a full and particular account stated in writing, embracing the whole period during which Defendant had so acted as the friend and gratuitous agent of Plaintiff; that the last mentioned account was true and just, and as such acquiesced in and approved of by Plaintiff; that, in and by the last mentioned account, a balance stood in favour of Defendant of the sum of £202, which Plaintiff admitted and promised to pay, when thereunto requested; that, from the 29th May, 1850, when the stated account was so furnished and delivered to Plaintiff, up to the 1st July, 1850, no transactions of any kind took place between Plaintiff and Defendant, and no moneys or securities of any kind whatever were during the last mentioned period delivered to or received by

Defendant, from or on behalf of Plaintiff. With his pleas Defendant fyled certain accounts which purported to be copies of the accounts alleged by Defendant to have been rendered to Plaintiff. The Plaintiff answered these pleas generally. After issue joined, Plaintiff inscribed the cause for *enquête*, and, on the 1st May, 1854, fyled certain *débats de compte* to the copies of accounts fyled by Defendant. The Plaintiff then demanded answer from Defendant to his *débats de compte*. The Defendant then moved the court, on the 17th May, 1854, that the *débats de compte* of Plaintiff might be rejected from the record, for the following reasons: Firstly, because the accounts mentioned in the *débats de compte* were not liable to be debated, inasmuch as they are and profess to be, only copies of accounts previously rendered by Defendant to Plaintiff. Secondly, because the issues raised by the Plaintiffs were confined to the question, whether or not an account had been rendered by Defendant to Plaintiff of the sums of money mentioned in Plaintiff's declaration, previous to the institution of the action, and the accounts debated were only copies of the accounts which Defendant alleges he had so rendered, and are only fyled as exhibits to facilitate the proof that their original were so rendered. Thirdly, because Plaintiff is not entitled, by law, to contest said accounts, and because the *débats de compte* are illegally and irregularly fyled.

PER CURIAM: "The court, having heard the parties, upon the motion of Defendant, that the paper writing fyled by Plaintiff, and styled *débats de compte*, be rejected from the record, having examined the proceedings, and deliberated, considering that, by the issues joined, as set up by the exceptions of Defendant, no *débats de compte* can be now had, until the several issues shall have been previously decided, the court doth grant the motion of Defendant, the fyling of the *débats de compte* being premature, and, in consequence, doth reject the paper writing styled *débats de compte* produced by Plaintiff." (4 *J.*, p. 304.)

ROSE and MONK for Plaintiff.

BADGLEY and ABBOTT for Defendant.

ACTION TO ACCOUNT.

SUPERIOR COURT, Montreal, 31st October, 1856.

Coram SMITH, J., MONDELET, J., CHABOT, J.

THE SAME PARTIES.

Held : That where an agent has rendered accounts of his gestion and administration to his principal, and that such accounts have been duly received by the principal without any objection being made thereto, an action *en reddition de compte* will not lie.

The pleadings are stated above at p. 258.

SMITH, J.: The Plaintiff alleged that Defendant, as agent of Plaintiff, had received large sums of money and should have invested the same and be held to account. Defendant pleaded that he had rendered accounts, that he did invest the monies, and that, in 1850, he finally rendered an account showing a balance of £200 in his favour, and to which Plaintiff did not object. The only evidence was the admission by Defendant in his plea, and the acknowledgment by Plaintiff on *faits et articles* that the accounts were regularly rendered, but that he did not receive them as final. The court held that this action could not go beyond the conclusions of an action *en reddition de compte,* and that although Defendant might have rendered, himself liable to Plaintiff in certain cases, and might still have monies in his hands, yet, an account having been found to have been rendered, the action must be dismissed.

"The court, considering that Plaintiff hath failed to establish the material allegations in his action, and further, considering that Defendant hath rendered, long before the institution of the present action, from time to time, accounts of the gestion and administration by Defendant of the monies confided to him, Defendant, by Plaintiff, and that the accounts so rendered by Defendant were duly received by Plaintiff, without any objection whatever being made thereto, and were taken and received by him as an account of gestion and administration of Defendant, of the sums of money placed by Plaintiff in the hands of Defendant, and, considering that, by reason of such accounting, no action can lie against Defendant *en reddition de compte,* as now demanded in and by the said action, doth dismiss the action, reserving to Plaintiff all other his recourse, if any he have, against Defendant, touching or concerning such gestion and administration aforesaid." (4 *J.*, p. 306.)

ROSE and RITCHIE, for Plaintiff.

BADGLEY and ABBOTT, for Defendant.

VENTE.—PRIVILEGE.

COUR SUPÉRIEURE, Montréal, 30 avril 1860.

Coram BERTHELOT, J.

SÉNÉCAL *vs.* MILLS, *et al.*, et TAYLOR, *et al.*, Int.

Jugé : 1° Que le vendeur, sans jour ni terme, non payé, peut revendiquer sa marchandise entre les mains d'un tiers acquéreur.

2° Que c'est au tiers acquéreur à prouver que la vente a été faite à terme, et qu'à défaut de cette preuve on doit présumer que la vente a été faite au comptant.

3° Que le fait que le grain revendiqué a été mêlé avec d'autre grain de même espèce, n'est pas un obstacle à la revendication. (1)

Dans le mois de juillet 1859, le Demandeur vendit à Joseph Dansereau, l'un des Défendeurs, 1401 minots d'avoine qu'il avait dans un hangar à Verchères. Dansereau, assisté du commis des Intervenants, reçut l'avoine, et la fit transporter immédiatement à bord d'une barge appartenant aux Intervenants, et conduite par Mills, l'autre Défendeur. L'avoine fut mêlée avec d'autre qui avait été prise ailleurs. Après la livraison, le Demandeur ne pouvant être payé, fit saisir-revendiquer la quantité d'avoine qu'il avait vendue à Dansereau, en vertu de l'article 176 de la coutume de Paris. Dansereau fit défaut. Mills contesta l'action, disant qu'il n'était que l'agent et l'employé des Intervenants ; que l'avoine en question avait été mise à bord de son bateau par ces derniers ; qu'il l'avait mêlée avec d'autre grain de même nature ; qu'elle ne pouvait plus être identifiée, et que la saisie-revendication ne pouvait être dirigée contre lui. Même contestation de la part des Intervenants, qui prétendirent de plus être propriétaires de cette avoine, l'ayant achetée avec d'autres quantités, de Dansereau, et lui en avoir payé le prix, dès avant la livraison, et que le Demandeur ayant laissé passer sa marchandise entre les mains d'un tiers acquéreur de bonne foi, à sa connaissance, avait perdu son privilège.

DORION, W., pour le Demandeur, émit comme propositions légales : 1° que l'on devait présumer la vente faite sans jour ni terme, lorsqu'il n'y avait pas de preuve du contraire (2). 2° que, sous l'opération de l'article 176 de la coutume de Paris, la revendication pouvait être faite même entre les mains de tiers acquéreurs de bonne foi ; que le vendeur non payé peut suivre sa chose en quelques mains qu'elle se trouve, parce

(1) V. art. 1999 C. C.

(2) Pothier, *Vente*, No 324.

qu'il n'en a jamais perdu la propriété (1) ; 3° que le mélange du grain avec d'autre grain de même espèce et nature ne pouvait faire perdre au vendeur son droit de revendication ; qu'il suffisait d'identifier l'avoine qu'il revendiquait, comme quantité, et non grain par grain (2).

ROBERTSON, A., pour le défendeur Mills et les Intervenants, combattit les propositions qui précèdent, et s'appuya particulièrement sur le défaut de preuve du Demandeur, et sur ce que la saisie-revendication ayant été faite lorsque l'avoine était en la possession des Intervenants, ces derniers devaient en être présumés propriétaires.

Jugement maintenant la saisie-revendication et déboutant l'intervention. (4 *J.*, p. 307.)

DORION, DORION et SENÉCAL, pour le Demandeur.
W. W. ROBERTSON, pour le Défendeur Mills.
A. ROBERTSON, pour les Intervenants.

PROCEDURE.—DECLARATION.

COUR SUPÉRIEURE, Montreal 28th June, 1855.

Coram SMITH, J., MONDELET, J.

WHITNEY *vs.* BURKE.

Held : That, in a declaration on a promissory note, the words "for value received," need not be expressed, but that the fact of the giving of such value is a matter for proof. (3)

An action was instituted to recover the amount of a promissory note for the sum of £154 17s. The declaration alleged the making of the note, and its delivery, for value received to Plaintiff, but did not allege that the note itself was made for value received. The Defendant demurred to the declaration, on the grounds that it did not allege that the note was made "for value received," that it appeared from the declaration that the note was made without value, and that it was a *nudum pactum*. At the argument, LAMBE, for Plaintiff, contended that the words "for value received" needed not to be expressed or alleged, but that the fact whether value was so received or not was a matter for proof. He quoted Smith, on contracts, § 100 ; Chitty, *on Bills*, p. 691, 61 ; Byles, p. 100, and page 306, note. After hearing, the demurrer was dismissed. (4 *J.*, p. 308.)

MONTIZAMBERT and MORRIS, for Plaintiff.
T. NYE, for Defendant.

(1) Ferrière, *G. C.*, tome 2, p. 1319 et 1320, Nos 1 et suiv., p. 1323 et 1324, No 13 ; Bourjon, tome 1, p. 145, tome 2, p. 695, sec. IV, No 21

(2) Pardessus, tome 4, p. 507 et 543. (3) V. art. 50 C. P. C.

PROCEDURE.—EXCEPTION A LA FORME.

SUPERIOR COURT, Montreal, 30th April, 1860.

Coram BADGLEY, J.

WHEELER et al. *vs.* BURKITT et al.

Held: That, where a female Defendant is described in the writ of summons as duly separated as to property from her husband, and Defendant pleads to the action, among, other things, that she was not separated from her husband as to property, such allegations will not be struck out, on the motion of the Plaintiff, on the ground that such allegation is matter of an exception *à la forme*. (1)

This was an action brought to recover the sum of $1390.07 alleged to be due by the female Defendant to the female Plaintiff; the female Defendant being described in the Plaintiff's declaration *as duly separated as to property from her husband, George F. Reiniger.* The female Defendant, among other things, pleaded that *she was not separated as to property from her husband.* After the fyling of Defendant's pleas, but before issue was joined, Plaintiff moved that so much of her pleas as denied the separation of property should be rejected therefrom, inasmuch as that allegation brought in question the description of the parties, and should have been the subject matter of an *exception à la forme.* This motion was rejected; the court considering that the separation was an allegation of fact, which Plaintiff would have been bound to prove under the general issue; and that, assuming the allegation to be true, it could not have been met by *an exception à la forme.* Motion rejected. (4 *J.*, p. 309.)

T. S. JUDAH, for Plaintiffs.

JOHN MONK, for Defendants.

SEPARATION DE BIENS.—PREUVE.

SUPERIOR COURT, Montreal, 29th September, 1860.

Coram MONK, J.

THE SAME CAUSE.

Held: That, where a Plaintiff alleges that a female Defendant is separated from her husband as to property, he is bound to prove it, either by an antenuptial contract or judicial sentence.

The pleadings in this cause appear above. Issue having been joined, and the cause having been inscribed for the adduction of evidence and final hearing on the merits, Plaintiff produced

(1) V. Art. 14 et 116 C. P. C.

two notarial deeds executed by the female Defendant, in which she acknowledged that she was duly separated as to property from her husband, and also her answers to interrogatories *sur faits et articles*, wherein she admitted that she had signed the deeds in question at the request of her husband.

T. S. JUDAH, for Plaintiff, thereupon, contended that the separation had been duly established.

MONK, for Defendant, argued that there could be but one of two modes by which a *séparation de biens* could be proved viz. an *antenuptial contract*, or a judicial sentence. The allegations in the deeds could not make evidence in favor of Defendant, and should not, consequently, operate against her. The court took the same view as Defendant's Counsel, and dismissed the action.

JUDGMENT: " The court considering that it is not proved, that Defendant, Sarah Ann Burkitt, was at the time of the institution of this action, or at any previous time thereto, separated as to property from George Frederick Reiniger, her husband, doth dismiss this action." (4 *J.*, p. 309).

T. S. JUDAH, for Plaintiff.

JOHN MONK, for Defendant.

VENTE.—FRANC ET QUITTE.

COUR SUPÉRIEURE, Montréal, 29 septembre 1860.

Coram BADGLEY, J.

PAQUET et uxor *vs.* MICLETTE.

Jugé: Que celui qui vend, avec la *clause de franc et quitte*, obtiendra jugement avec dépens contre l'acheteur qui aura plaidé et prouvé l'existence d'une hypothèque, pourvu qu'en déduisant du prix de vente le paiement réclamé par l'action, il reste une somme suffisante, entre les mains de l'acheteur, pour le garantir. (1)

Action *ex vendito*, pour la somme de cent quinze livres, avec intérêt, étant un terme échu du prix de vente stipulé en l'*acte* de vente du vingt-trois juillet 1858; outre les garanties ordinaires, cet *acte* portait la clause de *franc et quitte;* l'acheteur avait payé une somme de £250, pour le premier terme échu le premier novembre 1858. Le Défendeur contesta l'action, et allégua que, par *acte* du vingt février 1855, Sophie Gadbois avait vendu l'immeuble en question aux Demandeurs, et avait encore, sur cet immeuble, une hypothèque de *bailleur de fonds* enregistrée, pour une balance de £362 5 6 avec intérêt; que

(1) V. art. 1535 C. C.

le Défendeur était menacé d'éviction ; que la clause de *franc et quitte* stipulée en sa faveur était illusoire, et ne lui offrait aucune garantie ; que, partant il était recevable à demander que l'*acte* de vente du vingt-trois juillet 1858, fût rescindé et annulé, que la somme de £250, par lui payée aux Demandeurs, lui fut restituée par ces derniers, et que l'action des Demandeurs fut déboutée, avec dépens ; et subsidiairement à ce que, par le jugement à intervenir, il ne fût tenu payer la somme réclamée par les Demandeurs qu'en par ces derniers fournissant bon et valable cautionnement qu'il ne serait point troublé au regard de la dite hypothèque de *bailleur de fonds.* Les Demandeurs, dans une *réponse*, opposèrent à ces moyens une quittance par Sophie Gadbois du quinze mars 1858, réduisant son hypothèque de *bailleur de fonds* à la somme de £83,6,8, avec intérêt ; mais ils n'avaient fait enregistrer cette quittance qu'après la production du plaidoyer du Défendeur. Les Demandeurs, à l'audition de la cause, prétendirent que le Défendeur n'était pas fondé en droit à demander la rescision de l'*acte* de vente, en conséquence de la violation de la clause de franc et quitte ; que, d'ailleurs, comme, après avoir payé le montant de l'action, il lui resterait encore en main une somme plus que suffisante, pour le garantir contre la réclamation de Sophie Gadbois, il n'avait pas d'intérêt à plaider comme il l'avait fait, et que jugement devait être prononcé contre lui. Le Défendeur, à l'appui de ses conclusions, tendant à la rescision de l'acte de vente, cita *Rép. de Guyot*, vo *Franc et quitte* ; Nouv. Denisart, vo *Franc et quitte ; Rép. de Merlin*, vo *Franc et quitte* ; où il est établi que, dans l'espèce, l'acheteur est recevable à demander l'annulation de la vente. Lorsque le vendeur a stipulé la clause de franc et quitte, sachant qu'il existait des hypothèques sur l'immeuble, il est constitué en mauvaise foi, et est censé avoir agi frauduleusement, quel que soit le montant de l'hypothèque, en sorte qu'il n'est pas recevable à poursuivre, devant le tribunal, l'exécution des clauses de l'acte de vente, tant qu'il n'a pas fait disparaitre la cause du trouble, et son action doit être renvoyée provisoirement ; que, s'il obtient jugement, il doit toujours être condamné aux dépens, comme peine de son dol et de sa mauvaise foi. Le Défendeur n'était pas tenu en loi d'attendre l'échéance du dernier terme de paiement, pour plaider le trouble résultant de l'hypothèque, et dès que ces vendeurs lui intentaient une action il pouvait y opposer leur mauvaise foi. Il maintint enfin que comme la quittance produite, avec les *réponses* des Demandeurs, n'avait été enregistrée qu'après la production de son plaidoyer, et comme, par conséquent, il en ignorait alors l'existence, il devait à tout événement obtenir les frais de sa contestation. Jugement : " The court considering " that Defendant cannot be subjected to any present trouble

" by reason of the existing mortgage in the pleadings mentioned, inasmuch as he will retain in his hands, not including " the sum demanded in this cause, a portion of his purchase money exceeding the sum £83 6s. 8d., remaining " charged on the land, doth condemn Defendant to pay to " Plaintiff, the sum of &c., and costs of suit." (4 *J.*, p. 310.)

JODOIN et FALKNER, pour les Demandeurs.

ROY et BRUNEAU, pour le Défendeur.

CUSTOMARY DOWER.

SUPERIOR COURT, Montreal, 30th April, 1860.

Coram MONK, J.

SIMMS et al. *vs.* EVANS, et Divers Opposants.

Held : That dower stipulated in a marriage contract to be " such as is established by the laws of Lower Canada " is legal and customary dower and not *douaire préfix.* (1)

The sheriff returned the writ of *fieri facias de terris* with the proceeds of the sale of the real estate of Defendant. Opposant, Selina Wood, widow of Defendant, acting as well personally as in her capacity of tutrix to a minor child, issue of her marriage with Defendant, by her opposition *à fin de conserver*, claimed one-fourth of the moneys returned. The opposition contains the following allegations : That a contract of marriage was passed between her and Defendant, her husband, on the 17th February, 1844, at Montreal, by which exclusion of community is stipulated, and it is declared " that the " dower to which the said Selina Wood should be entitled " should be such as is established by the laws of Lower " Canada," but that she should only be entitled to it in case there should be issued of the marriage, out of which case, she renounced to all dower ; marriage of the parties, 19th February, 1844 ; birth of the minor child who still survives ; that the land seized was owned and possessed by Defendant prior to the marriage and thereafter to the time of his death ; death of Defendant, 1st February 1857 ; appointment of the widow as tutrix to the minor ; renonciation by her on behalf of the minor ; that the *douaire coutumier* to which Opposant, Mrs. Evans, is entitled in respect of land seized is the usufruct of one-fourth thereof (the marriage being a third marriage, and the children of the first marriage not being

(1) V. art. 1431 C. C.

entitled to dower) and the *douaire coutumier* of the minor child is the said one fourth part *en propriété*, and that the Opposant has a right to be collocated for one-fourth of the proceeds of the sale of the land subject to dower. Opposant Berthelet, based his opposition upon a notarial obligation made by Defendant in his favor, 24th March, 1846, registered 27th of the same month, hypothecating the land in question. By the report of distribution, Opposant, Berthelet, was collocated, to the exclusion of Mrs. Evans. The latter contested Berthelet's collocation, alleging that she ought to have been collocated in preference to him for her dower; that by virtue of her marriage with Defendant, and by law, the land and premises seized and sold became and were legally liable to *douaire coutumier*, in favor of Opposant and of her minor child; that the said dower was the legal and customary dower, and is created by law as a right of property, and not by the contract of marriage and was not a claim liable to registration. Opposant Berthelet, answered this contestation, setting forth the following legal pretentions: 1st. that the dower claimed by Mrs. Evans is not the legal and customary dower, but is the dower stipulated in her favor by her contract of marriage; 2. no designation, in the marriage contract, of real property, and, consequently, no right of hypothec acquired upon the property seized, and that the same was not affected by said dower; 3. that Mrs. Evans cannot contest the report of distribution, her marriage contract never having been registered and the *titre de créance* of Berthelet having been duly registered; 4. that the marriage contract is null as regards him for want of registration. (1)

RITCHIE, for Mrs. Evans: The legal points may be stated under two questions: 1. Is the dower claimable by Mrs. Evans, the *douaire légal et coutumier* created by law, or is it *douaire préfix*, in virtue of her marriage contract? 2. If the dower be the *douaire légal et coutumier*, was any registration required to preserve the rights of Mrs. Evans and of her minor child? The first question is important for if answered in the negative, there is an end to the claim of Mrs. Evans. It will be observed, that, by the contract of marriage, there is no exclusion of dower, and no renunciation thereto, except in the case of there being no issue of the marriage. Renunciation of dower must be expressed, " La renonciation tacite n'est jamais présumée en cette matière." (Guyot's Rép., vo *Douaire*, p. 284 and 285; Pothier, *Douaire*, p. 2.) Where the contract of marriage is silent, as to dower, it still exists and that, even where a large donation is made, in the

(1) V. art. 2116 C. C.

marriage contract, by the husband to the wife, and which might be presumed to be intended to take the place of dower. (Guyot, vo *Douaire*, p. 283.) Upon referring, however, to the definitions given by the various legal writers to *douaire préfix*, it will appear that the dower in question is undoubtedly *douaire coutumier*, notwithstanding it is referred to in the contract of mariage. " Douaire préfix est celui que les parties *substituent* par leur contract de mariage au douaire coutumier." (*Merlin's Rép.*, vo *Douaire.*) " Le douaire est appelé *préfix*, lorsqu'il est constitué par le contrat de mariage, *différemment du coutumier.*" (Renusson, *Douaire*, p. 38.) " Le douaire préfix ou conventionnel *vient de l'accord et convention des contractants* dans leur contrat de mariage, *et qui est réglé autrement que le douaire ne l'est par la coutume.*" (Ferrière, sur Paris, tit. 12, art. 247, No 7, p. 659, Grande Coutume; Pigeau, *Proc. civ.*, p. 258 and 259.) In the present case, the parties established no dower, but merely stipulated that the dower should be the legal and customary dower, such as is established by law. While the dower thus referred to does not conform to the definitions given of *douaire préfix*, it is easy to establish, by authority, that it is really *douaire coutumier.* Ferrière, in his commentaries upon the *Coutume de Paris* (art. 247, p. 671, No 1, Grand Cout.) says that there is no *necessity* for a stipulation in the contract of marriage that the wife shall have *douaire coutumier :* a clear intimation that, if it be so expressed, the dower is not *préfix*, but remains *coutumier.* " Ce droit (le douaire) est acquis, *nonobstant le défaut de mention d'icelui par le contrat de mariage,* c'est-à-dire, indépendamment de toute convention, pourvu qu'il n'y en ait pas de contraire : le douaire étant un droit légal." (Bourjon, tit. 12, cap. 2, sec. 2.) Pigeau, (vol. 2, p. 258) defines the *douaire coutumier* to be that which the law gives when there is no contract " *ou lorsque, dans le cas où il y en* " *a un, il* ne contient pas de fixation de douaire." " Le douaire coutumier est un droit purement légal *qui prend sa source* dans la loi. Nouv. Denisart, vo *Douaire*, § III, p. 183. " *Quand* " *le douaire stipulé par contrat de mariage est conforme au* " *douaire coutumier*, IL EST COUTUMIER et *non préfix*, puisque, " sans la convention, il serait dû à la femme. Cette stipula- " tion n'est pourtant pas inutile, vu que l'hypothèque du " douaire sans convention et en vertu seulement de la disposi- " tion de la coutume n'est que du jour de la célébration du " mariage, et l'hypothèque du douaire stipulé est du jour du " contrat." Ferrière, *Grand Cout.*, art. 247, No 7, p. 659. See also Lemaître, *Cout. de Paris*, p. 278, bottom of page, and p. 296, top of page. See also 5 *Merlin's Rép.*, vo. Gains nup-

tiaux, § VII, reporting a case where *douaire coutumier* was stipulated in a *contrat de mariage*.

"THE COURT, considering that the dower mentioned in the contract of marriage between Selina Wood, and her late husband, William Evans, dated the 17th February, 1844, was and is the legal and customary dower known as such to the laws of that part of this province heretofore known as the Province of Lower Canada, and as such customary and legal dower, not requiring enregistration for any purpose of law; and seeing that Selina Wood, as well in her own name as in her capacity of tutrix to Frederick William Evans, minor, issue of her marriage with William Evans is by law entitled to be collocated for the dower before and in preference to Opposants, Berthelet and Elliott; doth order that the draft of distribution be revised and reformed, and Selina Wood, in her said name and capacity, collocated before and in preference to Olivier Berthelet and Andrew Elliott, for the sum of £230 3s. 1d., being the one-fourth part of the amount levied of the land belonging to William Evans less the amount allowed to the *adjudicataire*, for deficiency in the said land, and as the amount of the said customary dower claimable thereon as stipulated in favour of Selina Wood and her minor child, by the said contract of marriage." (4 *J.*, p. 311, et 10 *D. T. B. C.*, p. 301.)

ROSE and RITCHIE, for Opposant Wood.

BELLE, for Opposant Berthelet.

COMMISSAIRES POUR L'ERECTION CIVILE DES PAROISSES.—CERTIORARI.

COUR SUPÉRIEURE, Montréal, 23 décembre 1858.

Coram C. MONDELET, J.

Ex-parte, sur application de ROBERT et al. pour writ de *certiorari et* VIGER et al., Commissaires pour l'érection civile des paroisses, etc., *et* JOSEPH ALLARD et al., Syndics.

Jugé : 1º Que les commissaires pour l'érection civile des paroisses n'avoient aucun droit, sous l'opération de l'Ordonnance provinciale, 2 Vict., chap. 29, et des lois qui l'ont précédée et suivie, de déléguer à l'un d'eux, leur pouvoir, à l'effet de procéder à l'enquête qui a eu lieu dans l'espèce actuelle.

2º Que cette délégation est un excès de juridiction ;

3º Que tous les procédés qui ont eu lieu en conséquence de cette délégation peuvent être mis de côté au moyen du writ de certiorari.

L'affidavit produit de la part des Requérants, pour obtenir un writ de certiorari, à l'effet de faire annuler tous les procédés des commissaires pour l'érection civile des paroisses,

est comme suit : " Qu'après les procédés ecclésiastiques voulus en pareil cas, sur requête de certains habitants, cultivateur de la paroisse de St-Michel de Lachine, demandant à Sa Grandeur l'évêque catholique de Montréal, son décret pour la construction d'une église, sacristie, presbytère et cimetière dans la dite paroisse, et, après l'émanation de décret canonique de Sa Grandeur, le dit évêque, certains individus se disant propriétaires intéressés dans la construction d'une église, sacristie, presbytère et cimetière, dans la paroisse, auraient, le dizième jour d'août 1854, présenté une requête aux commissaires nommés, en vertu des diverses ordonnances concernant l'érection civile des paroisses, pour le diocèse catholique romain de Montréal, demandant l'autorisation de procéder à l'élection de syndics pour surveiller la construction d'une église, sacristie, presbytère et cimetière dans la paroisse, les signataires se disant former la majorité des habitants français-canadiens de la paroisse ; que la dite requête comportait cent trente-huit signatures, ou noms d'individus que la requête alléguait être requérants habitants francs-tenanciers catholiques de la paroisse ; que, sur telle requête, il émana une ordonnance, le 14 septembre 1854, de Jacques Viger, Joseph U. Beaudry, Théod. Doucet, Alfred Pinsonneault et Joseph Belle, commissaires nommés pour le diocèse catholique romain de Montréal, autorisant l'élection des syndics pour surveiller la construction de la dite église, sacristie, presbytère et cimetière en exécution du décret ; que, sur un certificat de Messire A. Duranseau, certifiant qu'une assemblée pour l'élection des syndics avait été dûment faite et convoquée, Joseph Allard, Louis Barré, Jean-Baptiste Quesnel, André Legault, Nicolas Martin, François Paré, présentèrent une requête, le 3 octobre 1854, aux commissaires pour confirmation de leur élection faite (suivant les allégués de leur requête), le vingt-quatre septembre 1854, à laquelle assemblée ils alléguaient avoir été élus avec un nommé Henri Pigeon ; que, le neuf octobre 1854, sur la dite requête, émana une ordonnance des commissaires donnant avis aux intéressés que le dit acte d'élection, ainsi que la requête des syndics, serait pris en considération par les commissaires, le vingtième jour du même mois d'octobre, à onze heures du matin, en l'étude de E. Guy, alors leur secrétaire, à Montréal, auxquels jour et heure tous Opposants, si aucun il y avait, seraient entendus ; que, le dit jour vingt octobre 1854, par R. et G. Laflamme, avocats, comparurent devant les dits commissaires, un certain nombre d'individus dont les noms sont donnés, tous propriétaires francs-tenanciers catholiques de et dans la paroisse de St-Michel de Lachine, dans le district de Montréal, et déclarèrent s'opposer à l'homologation du dit acte d'élection, et lesquels produi-

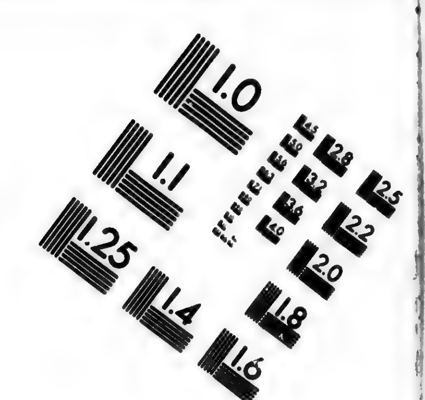
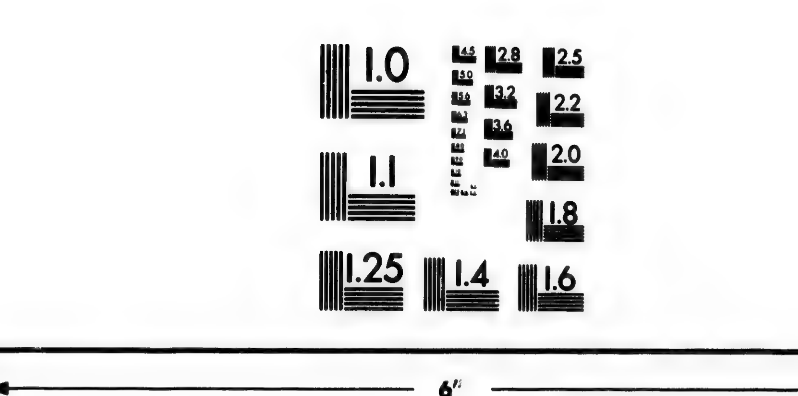


IMAGE EVALUATION
TEST TARGET (MT-3)





sirent, le six novembre de la dite année, des moyens d'opposition par lesquels ils alléguaient : 1° que la requête du dix août 1854, faite aux commissaires pour l'élection des dits syndics contenait des noms supposés ; 2° que l'élection des syndics était nulle ; 3° que, lors de l'élection des syndics, la majorité des habitants catholiques francs-tenanciers propriétaires protestèrent contre telle élection, déclarant, là et alors, qu'ils refusaient de procéder à telle élection, et demandant que leurs protestations fussent consignées au procès-verbal de telle élection ; que leur demande fut refusée, et que le président refusa de mettre aux voix une demande ou proposition comportant telle déclaration ; 4° que quelques-uns des assistants firent choix des nommés Joseph Allard, Louis Barré, Jean-Baptiste Quesnel, André Legault, Nicolas Martin, François Paré, et Henri Pigeon : que cette élection était nulle : 1° parce que la construction d'une nouvelle église, sacristie, presbytère et cimetière était inutile et ruineuse pour les contribuables ; 2° parce que telle demande n'avait pas été régulièrement et légalement faite aux autorités ecclésiastiques ou civiles ; 3° parce que telle demande n'avaient pas été faite par la majorité des habitants francs-tenanciers intéressés ; 4° parce que le site de l'église ayant déjà été fixé, on ne pouvait le déplacer sans nécessité évidente et absolue, ce qui n'était pas allégué ; 5° parce que plusieurs des noms contenus dans les deux requêtes, savoir : celle présentée à l'évêque pour obtenir son décret canonique, et celle présentée aux commissaires n'avaient jamais été donnés, que, parmi les francs-tenanciers propriétaires dont les noms se trouvaient apposés aux dites requêtes, plusieurs, et, nommément les Opposants, n'auraient jamais autorisé l'apposition de leurs noms ; que les noms de plusieurs autres se trouvaient là par erreur, sans consentement, ou surpris par de faux prétextes ; 6° parce que plusieurs des Requérants étaient protestants, non propriétaires, mineurs, ou absents, savoir : non propriétaires francs-tenanciers résidants ; 7° parce que les suivants n'avaient jamais opposé ou autorisé l'apposition de leurs noms sur la dite requête : (C. D., etc.) ; 8° parce que ceux des Requérants qui avaient véritablement droit de demander et qui avaient demandé la construction ne composaient qu'une faible minorité. Les Opposants invoquaient, en outre, à l'encontre de l'acte d'élection de syndics plusieurs moyens de nullité : 1° que tous les procédés de l'assemblée ont été irréguliers et illégaux ; 2° que l'élection ne s'est pas faite à la pluralité des voix de francs-tenanciers propriétaires de la paroisse présente ; 3° parce que les votes de plusieurs individus non propriétaires et non francs-tenanciers y ont été pris, et que l'élection a été faite à l'aide de telles voix ; 4° parce que le secrétaire de l'assemblée a refusé de consigner au procès-verbal les protestations et

réquisitions des propriétaires francs-tenanciers intéressés dans l'élection ; 5° parce que le président et le secrétaire de l'assemblée ont refusé et n'ont pas mis aux voix la proposition régulièrement faite de plusieurs des intéressés à l'élection ; que sur l'opposition ainsi faite et produite, les Requérants, ou ceux d'entre eux, pour lesquels Jules R. Berthelot, avocat, avait droit et autorisation de comparaître, produisirent, le vingt-huit novembre 1854, une réponse à l'opposition, alléguant les moyens suivants, savoir : 1° qu'il n'y avait rien dans la procedure qui fît voir que les personnes qui y sont mentionnées comme Opposants, le fussent réellement ; 2° que ceux d'entre les Opposants qui étaient francs-tenanciers ne formaient qu'une faible minorité des habitants de Lachine ; 3° que plusieurs de ceux dont les noms sont mentionnés comme Opposants ne sont ni francs-tenanciers ni propriétaires, que les nommés (suivent les noms) étaient non propriétaires ; 4° que les nommés (suivent les noms) qui ont signé comme Requérants ne pouvaient pas être Opposants ; 5° que les personnes ci-dessus nommées n'ont autorisé personne à comparaître pour eux et que leurs noms doivent être retranchés ; 6° qu'un certain nombre d'Opposants, au nombre de vingt-huit, mentionnés dans la réponse devaient être retranchés, parce qu'ils avaient pris part à l'élection des syndics ; que, le vingt janvier 1855, Rodolphe Laflamme, avocat, produisit, devant Etienne Guy, alors secrétaire des commissaires, à son bureau, en la cité de Montréal, un acte de désaveu, en bonne et due forme, de la part de———, par lequel acte de désaveu, produit en vertu d'une procuration spéciale donnée à cet effet par les désavouants, à leur procureur, le dit R. Laflamme, agissant comme tel procureur, aurait déclaré que les constituants désavouaient Mtre Jules R. Berthelot, avocat et procureur, pour avoir le vingt octobre 1854, produit devant les commissaires une comparution, pour et au nom des constituants, aux fins de les représenter, comme leur procureur et avocat, pour demander la confirmation de l'élection des syndics nommés pour établir la cotisation légale pour la construction d'une église, déclarant, en outre, le dit procureur, en vertu de la dite procuration, que les constituants n'avaient jamais donné leur consentement à l'apposition de leurs noms sur telle requête demandant l'autorisation des commissaires de nommer des syndics pour établir la cotisation légale pour les dites bâtisses, et qu'ils n'ont jamais demandé la confirmation de l'élection des syndics ; que l'acte de désaveu fut régulièrement produit, avec une requête en désaveu fondée sur tel acte régulièrement signifié au dit Jules R. Berthelot, en même temps qu'une copie du dit acte de désaveu ; qu'aucun procédé ne fut adopté par les Requérants, ou le dit Berthelot, sur le dit désaveu, qu'aucune réponse ou contestation d'icelui ne fut produite

par les Requérants ; que le trente novembre 1854, les commissaires, savoir : Jacques Viger, Joseph Roy, alors commissaires et maintenant décédés, et Joseph Ubalde Beaudry, déléguèrent le dernier, un d'entre eux, pour procéder à la preuve des allégués faits par les Requérants et Opposants, sur la requête tendant à faire nommer des syndics pour surveiller la construction de la dite église, et, par une autre ordonnance, en date du vingt-neuf novembre 1855, les commissaires, savoir : Joseph Roy, Joseph U. Beaudry, Alfred Pinsonnault et Joseph Belle, en leur qualité, déléguèrent et autorisèrent Beaudry, un des commissaires, à se rendre en la paroisse de Saint-Michel de Lachine, pour procéder à terminer l'enquête commencée par lui, déclarant, par la dite ordonnance, que, vu le rapport fait par Beaudry sur la première ordonnance, et, vu que la preuve n'avait pas été terminée ou complétée, il fut ordonné, du consentement des parties, que Beaudry fût délégué et autorisé à se rendre à la paroisse de Lachine, le quinzième jour de décembre alors prochain, aux fins de procéder à terminer l'enquête par lui commencée ; que, subséquemment les commissaires, savoir, Jacques Viger, Joseph Belle et Théod. Doucet, ont, le vingt et un février 1857, en leur qualité, émané une ordonnance autorisant Beaudry, de procéder à terminer et compléter la preuve des allégués respectifs faits par les parties, soit à Montréal, soit à Lachine, et, dans ce dernier cas, que Beaudry fut tenu de donner avis aux intéressés du jour et de l'heure où il procéderait ; qu'en vertu de telle Ordonnance, Beaudry donna avis, sous sa signature, requérant un certain nombre d'individus, qu'il désigna nommément, de comparaître jeudi, le vingt-sept août, au bureau de Joseph Dubreuil, en la paroisse de Saint-Michel de Lachine, pour donner leurs raisons pourquoi leurs noms ne seraient pas rayés du nombre des Requérants, en autant qu'ils n'étaient pas catholiques. 2° D'autres individus qu'il désigna par leurs noms pour venir nier ou admettre leur signature. 3° Requérant, un certain nombre d'individus de venir justifier leur qualité de propriétaires, notifiant en même temps les intéressés qu'il recevrait également telle preuve qui serait offerte quant aux paroissiens qui n'avaient signé ni la requête ni l'opposition, Beaudry restreignant, par tel avis, la preuve à faire, contrairement à l'ordonnance, et indiquant et suggérant, de sa propre autorité, quelle preuve les parties avaient à faire, et tendant par ces procédés, à faire lui-même l'instruction de la preuve qu'il appartenait seulement aux parties intéressées de faire, et ce contrairement et en dehors de l'ordonnance, et en violation de la loi qui ne lui déléguait aucune telle autorité ; que, sur l'exécution de tel avis, Beaudry, en sa qualité de délégué, refusa aux parties de procéder à la preuve, en dehors

des limites qu'il avait assignés par le dit avis, contrairement à la loi et à l'ordonnance qui le déléguait ; que Beaudry a, le vingt-quatre septembre dernier, filé entre les mains du secrétaire des commissaires un rapport de ses procédés sur les ordonnances le déléguant comme susdit ; qu'aucun jour ne fut fixé pour clore ou faire l'enquête des parties, après les procédés faits par Beaudry, au dit lieu de Lachine le vingt-sept août dernier. En dehors de l'enquête faite par-devant le délégué, il n'y eut aucune enquête, aucune preuve reçue ou produite devant les commissaires et les Opposants, savoir : les Requérants pour writ de certiorari, ne furent, en aucun temps, interpellés de produire leur preuve devant les commissaires, et ne furent jamais notifiés d'aucun ajournement pour telle preuve, ou aucune clôture ou forclusion, faute de produire telle preuve devant les commissaires, ne fut prononcée ; qu'en outre Beaudry, en sa qualité de délégué, a refusé d'entendre aucune preuve offerte par les Opposants, tendant à établir que certaines signatures apposées à la requête demandant l'autorisation de procéder à l'élection des syndics, n'avaient jamais été données par les individus dont elles comportaient être les signatures, à moins que ces individus ne fussent parties opposantes ; que le dit délégué a, en outre, rejeté le désaveu pour dix des désavouants, sans preuve faite relativement au désaveu, et a, en outre, retranché, comme ne pouvant être opposants, quatorze individus qui avaient signé, et a, en outre, retranché dix individus sur les Opposants comme n'ayant pas qualité, quoique leurs qualités ne fussent pas niées ou mises en question par les Requérants, sur le fondement qu'ils n'étaient pas résidants, et, par tels procédés diminuant le nombre des Opposants et des intéressés dans la construction de la dite église et le délégué, admettant comme propriétaires, sur contestation faite de leurs qualités des individus qui déclaraient n'avoir pour titres à la propriété qu'une promesse verbale lors de leurs signatures apposées à la requête ; qu'après la production du rapport de Beaudry devant les commissaires, il n'y eut aucune demande, avis ou interpellation faites aux parties de procéder à leur preuve ; aucune demande ou déclaration de forclusion, et le déposant est informé que les procureurs ou avocats ne reçurent aucun avis légal qui soit parvenu à leur connaissance d'aucun procédé ultérieur ; que, nonobstant, le quatorze octobre dernier, les commissaires, savoir : Jacques Viger, Joseph-Ubald Beaudry et Théod. Doucet, procédèrent à rendre jugement sur la requête, l'opposition et le désaveu sur déclaration faite par T.-T. Durand, secrétaire, qu'il avait laissé avis aux procureurs et avocats des parties, que les commissaire prendraient en considération les requêtes, oppositions et désaveu, et, là et alors,

les commissaires, hors la présence des Opposants ou de leurs procureurs, prononcèrent leur jugement, par lequel ils déclarent que le désaveu n'est valable qu'à l'égard de Benjamin Carignan, Marie-Angélique Monette, Dosithé Legault dit Deslauriers, et Timoléon Poirier, rejetant le désaveu quant aux autres parties y dénommées et déclarant que la requête aux commissaires pour l'élection des syndics porte les noms des Requérants formant la majorité des habitants francs-tenanciers de la paroisse de St-Michel de Lachine et y domiciliés, seuls intéressés dont la majorité soit requise suivant la loi, et adjugeant sur la requête présentée par la majorité des syndics, demandant la confirmation de leur élection, et la permission de faire la répartition des sommes requises pour les constructions susdites, considérant que le désaveu ne pourrait en rien affecter la requête, et considérant que les moyens invoqués par les Opposants ne pourraient faire rejeter la demande des syndics, les commissaires, sans égard à la dite opposition, ont confirmé et homologué le susdit acte d'élection, accordant les conclusions de leur requête, et les autorisant à cotiser les propriétaires de terres et autres immeubles situés dans la paroisse de Lachine, et à prélever le montant de la somme pour laquelle chaque individu serait cotisé et colloqué pour sa part contributive, tant pour effectuer la construction des travaux que pour subvenir aux frais nécessaires qu'occasionnera la cotisation ; que les commissaires, en rendant le dit jugement, ont excédé leur juridiction et les Opposants requérant writ de certiorari sont lésés par tel jugement ; qu'en exécution du dit jugement, les syndics ont procédé à la confection d'un acte de cotisation, et ont le trente-un mars 1858, demandé aux commissaires l'homologation du dit acte ; que le dit jour, trente-un mars 1858, les Requérants ont produit une opposition à l'homologation, alléguant la nullité et l'irrégularité des procédés adoptés par les commissaires, et la nullité et l'irrégularité de l'ordonnance par eux rendue le 14 octobre 1857 ; que nonobstant telle opposition, Jacques Viger, Joseph-Ubald Beaudry et Théod. Doucet, tous commissaires siégeant, rendaient leur jugement ou ordonnance rejetant l'opposition, et homologuant l'acte de cotisation pour être suivi et exécuté suivant sa forme et teneur, et ordonnant que les ouvrages nécessaires pour la construction des édifices soient donnés au rabais, et que la cotisation portée sera exigible des contribuables en douze paiements trimestriels et égaux, dont le premier deviendra dû et payable le premier jour d'août prochain, et, ensuite, successivement tous les trois mois, jusqu'au paiement final. Que les dits jugements ainsi que celui du quatorze octobre dernier sont nuls, illégaux et doivent être déclarés non avenus par cette cour, ainsi que tous et chacun

des procédés, ordres et ordonnances faits donnés et rendus par les commissaires avant le dit jugement, et ce pour, entr'autres raisons les suivantes : 1° parce que les Requérants n'ont, en aucune manière, établi qu'ils avaient, et n'avaient pas la majorité des habitants francs-tenanciers, propriétaires catholiques de la paroisse de St-Michel de Lachine, ainsi que l'exige la loi, pour demander l'autorisation de procéder à l'élection de syndics, et, par suite, les commissaires n'avaient aucune juridiction, autorité ou pouvoir d'émaner l'ordonnance du quatorze septembre 1854 ; 2° parce qu'aucun procès-verbal, en bonne forme, suivant la loi, de l'assemblée pour l'élection des syndics n'a été fait et produit devant les commissaires, constatant telle élection à la majorité des voix ; 3° parce que les commissaires ne pouvaient, par leur jugement, en aucune manière statuer sur le désaveu fait et produit attendu qu'aucune contestation ne fut jamais liée sur tel désaveu, aucune enquête faite, aucun avis donné aux désavouants ou à leurs procureurs pour procéder, ou pour leur enjoindre de procéder, ou pour leur intimer que les commissaires entendaient ou voulaient statuer sur leur prétention, et qu'ils ont été condamnés, et leurs prétentions déterminées par le jugement du quatorze octobre dernier, sans aucune demande à cet effet formulée par aucune des parties intéressées ; 4° parce que toute la procédure faite, instruite et ordonnée par les commissaires antérieurs, et pour arriver au jugement sur le mérite de l'opposition est nulle, contraire à la loi et ne peut servir de base au jugement rendu ; 5° parce que les commissaires n'avaient par la loi, aucune autorité, pouvoir ou juridiction de déléguer aucun d'entre eux pour entendre la preuve, et que, par suite, les deux ordonnances par eux rendues pour faire la preuve sur les contestations de l'opposition et de la requête, savoir : l'ordonnance du trente novembre 1854, déléguant et nommant Beaudry, pour procéder à la preuve des allégués faits tant par les Requérants que par les Opposants, et l'ordonnance du vingt-neuf novembre 1855, pour le même objet, sont nulles, et ne peuvent servir pour justifier le jugement rendu par les commissaires ; 6° parce qu'en supposant même que la preuve reçue par Beaudry, en sa qualité de délégué fut légalement prise, cette preuve était illégale, et le commissaire délégué a outrepassé ses pouvoirs, violé la loi, et les commissaires, en sanctionnant et ratifiant ses procédés, par le jugement du quatorze octobre dernier, ont violé la loi, outrepassé leurs pouvoirs et excédé la juridiction ; 7° parce que le commissaire délégué a fait, ordonné, et reçu une preuve outre et en dehors de la contestation soulevée entre les parties intéressées, a refusé d'accepter comme propriétaires, et a rejeté du nombre de propriétaires francs-tenan-

ciers intéressés, un grand nombre des Opposants dont la qualité de propriétaires et intéressés n'étaient pas mise en question par les Requérants ; le commissaire délégué ayant retranché de la liste des Opposants tous ceux des propriétaires qui ne résidaient pas dans la paroisse, sans que tel retranchement fût demandé par aucune des parties, et sans que leur qualité de propriétaire fût niée ou aucunement contestée, et les commissaires, en sanctionnant et ratifiant tel acte, ont excédé leur juridiction ; 8° parce que l'ordonnance des commissaires, en date du vingt-un février 1857, en supposant qu'elle fût dans les attributions des commissaires, n'a jamais eu son effet, les Opposants n'ayant jamais été appelés, et n'ayant jamais eu, aux termes de la dite ordonnance, l'occasion de faire ou compléter l'enquête : Beaudry ayant, par son avis, restreint l'effet de la dite ordonnance, l'ayant modifié, de son autorité privée, en sa qualité de délégué, et ayant refusé l'admission d'aucune preuve en dehors de celle par lui indiquée et requise par son avis ; 9° parce qu'aucune preuve ou enquête légale n'a été faite devant les commissaires pour établir les faits allégués par la dite opposition, lesquels devant être établis avant que les commissaires pussent procéder à rendre jugement, et sans la preuve desquels ils n'avaient aucune juridiction pour prononcer tel jugement ; 10° parce qu'aucun jour ne fut fixé par les commissaires, pour clore ou faire l'enquête des parties devant eux ; 11° parce que, après les procédés faits par Beaudry, en sa qualité de délégué, le 27 août dernier, il n'y eut aucune enquête des Opposants, savoir : les Requérant *writ de certiorari*, ne furent, en aucun temps, interpellés de produire leur preuve, ou de la terminer, et ne furent jamais notifiés d'aucun ajournement pour telle preuve ou d'aucune demande de clôture ou de forclusion, faute de produire telle preuve devant les commissaires ; 12° parce que le délégué Beaudry a refusé d'entendre aucune preuve tendant à établir que certaines signatures opposées à la requête demandant l'autorisation de procéder à l'élection des syndics n'avaient jamais été données par les individus dont elles comportaient être les signatures, à moins que ces individus ne fussent parties opposantes ; et a, en outre, retranché du nombre des Opposants quatorze individus qui avaient signé la requête, et, en outre, retranché dix individus, comme n'ayant pas les qualités, quoique leurs qualités ne fussent pas niées, ou mises en question, et que les commissaires, en sanctionnant tels procédés, ont excédé leur juridiction ; 13° parce que Beaudry, en sa qualité de délégué, n'a jamais exécuté l'ordonnance des commissaires du vingt et un février 1857, mais l'a, au contraire, restreinte et modifiée ; a dirigé et fait, sans la demande des parties, la preuve de faits qui étaient dans le domaine exclusif des parties intéressés

et que les commissaires, en adoptant et sanctionnant tels procédés, ont excédé leurs pouvoirs.

R. LAFLAMME, pour les Requérants, s'appuyant sur les raisons alléguées dans l'affidavit, soutint, que la délégation de Beaudry était nulle. Les commissaires pour exercer l'autorité, juridiction, et tous les pouvoirs qui leur sont donnés par l'ordonnance provinciale, 2e Vict., chap. 29, doivent être au moins trois d'entre eux. Ils n'ont droit de déléguer l'un d'eux que dans un cas seulement, celui prescrit par la 7e section, lorsqu'il s'agit de fixer les limites, bornes et démarcations pour l'érection d'une paroisse, et qu'il devient nécessaire de faire une descente sur les lieux. Les commissaires ont excédé leur juridiction en rendant les deux ordonnances déléguant leur pouvoir à l'un d'eux pour recevoir l'enquête, et tous les procédés qui s'en sont suivis sont nuls. Les commissaires ne pouvaient adopter le rapport de leur délégué, sans violer les dispositions du statut qui créaient leur juridiction. L'ordonnance par laquelle ils déléguèrent Beaudry ne conférait tout au plus à ce dernier que le pouvoir de faire l'enquête généralement. En assumant, comme il le fit par les procédés, le contrôle et la direction de la preuve, il excédait ses pouvoirs, il restreignait illégalement les parties dans l'exercice de leurs moyens de défense, et c'était un excès de juridiction qui affectait de nullité tous les procédés des commissaires auxquels cette enquête servait de base, et leur enlevait toute juridiction pour imposer sur les contribuables une cotisation aussi onéreuse que celle demandée. De plus, la clause 16 du statut 2 Vict., chap. 29, donnait les qualifications requises des parties ; et il ne pouvait pas être au pouvoir d'un commissaire d'établir d'autres disqualifications que celles établies par le statut. Tous les propriétaires catholiques résidants ou non résidants sont également assujétis au paiement de la cotisation, tous sont intéressés dans la construction de cette église, par conséquent, ils avaient droit de se porter Opposants, ce qui résultait des dispositions mêmes du statut. Le commissaire délégué retranche tous les non résidants, sur le principe qu'ils sont non résidants. En défalquant tous ces propriétaires non résidants, le délégué place la majorité chez les Requérants. Les commissaires sanctionnent ce procédé. Il y a là excès de juridiction manifeste qui doit entraîner la nullité du jugement final.

Pominville, pour les syndics : L'ordonnance 2 Vict., ch. 29, donne aux commissaires entière juridiction, pouvoir et autorité d'entendre, juger et déterminer, sans les astreindre à aucune forme particulière de procéder. L'élection des syndics a été faite conformément aux sections 9 et 10, et suivant l'ordonnance des commissaires. Par la section 7, les commissaires peuvent déléguer l'un d'eux, lorsqu'ils le jugent à propos, pour éviter le déplace-

ment et le voyage d'un trop grand nombre d'intéressés. La procédure pour instruire la cause a été faite du consentement des parties. Les deux ordonnances, celle du 30 novembre 1854 et celle du 29 novembre 1854, déléguant Beaudry pour recevoir la preuve, ont été rendues par les commissaires, à la demande des Requérants eux-mêmes. Le commissaire délégué n'a pas outrepassé les pouvoirs à lui donnés par les ordonnances des commissaires. Il n'a fait qu'user de la latitude et des pouvoirs d'un juge enquêteur, ceux de régler ce qui est pertinent à la cause. Avec son rapport, il a transmis aux commissaires tous les témoignages qu'il a plu aux parties intéressées de produire. L'enquête a eu lieu, tant sur la requête, l'opposition, que sur le désaveu. Ce rapport ne fait que constater le dire des témoins, et les faits apparents même par le dossier. La 16e Vict., ch. 125, sec. 6, reconnaît à chaque commissaire le droit d'assermenter les témoins. Les commissaires n'ont pas homologué le rapport de Beaudry, ils ne l'ont considéré que comme partie de la preuve, et ont rendu leur jugement sur tous les témoignages produits. Les Requérants n'ont fait aucune objection à cette enquête, ils ont produit des témoins, et ne se sont pas plaint devant les commissaires des procédés de Beaudry. Ils ne peuvent attaquer ce procédé qu'ils ont eux-mêmes demandé, et qui a été fait avec leur consentement.

La cour, par son jugement, annule tous les procédés adoptés depuis le 30 novembre 1844 : " La cour, après avoir entendu les Syndics et les Requérants, sur le mérite du writ de certiorari et autres sujets à contestation. Considérant que les commissaires pour l'érection civile des paroisses et autres objets, sous l'opération de l'ordonnance provinciale, 2 Vict., chap. 29, et des lois qui l'ont précédée et suivie, n'avaient aucun droit de déléguer comme ils l'ont fait, à Joseph-Ubald Beaudry, l'un d'eux, leurs pouvoirs à l'effet de procéder à l'enquête qui a eu lieu. Considérant qu'en ce faisant les commissaires ont excédé leur juridiction, ont fait un acte absolument nul, que le consentement des parties ne pouvait et n'a pu valider, et dont l'effet est que leur ordonnance du 30 novembre 1854, aussi bien que tous les procédés qui l'ont suivie, et le jugement du 14 octobre 1857, et aussi le jugement du 31 mars 1858, sont nuls, et doivent être cassés, ayant été rendus sans preuve. Casse, annule et met au néant tous les procédés des commissaires, depuis et compris leur ordonnance du 30 novembre 1854, et tous les jugements, ordres et ordonnances qui l'ont suivie, avec dépens contre les Syndics." (4 *J.*, p. 316.)

LAFLAMME, LAFLAMME et BARNARD, Avocats des Requérants.
CARTIER et POMINVILLE, Avocats des Syndics.

COPARTNERSHIP.—JURY-TRIAL.

SUPERIOR COURT, Montreal, 13th and 14th November, 1860.

Before Mr. Justice BADGLEY, and a special Jury.

And 27th November, 1860.

Coram MONK, A. J., in banco.

HIGGINSON *vs.* LYMAN *et al.*

1. A promise, signed by one partner, in the name of his firm, but without authority from his partners, undertaking to receive a stranger into that firm, is not binding upon the members of it; and *semble*, even silence or inaction on the part of the other members of the firm, would not be an implied sanction of such promise, although such sanction might be inferred from circumstances. (1)

2. An agreement to take a person into partnership, after the lapse of a specified time, "upon terms that shall be mutually satisfactory," but specifying no conditions as to duration, shares, and the like, is not such an agreement as will afford any basis for the assessment of damages, in the event of a breach of it.

3. A motion to set aside a verdict and dismiss the action, or to grant a new trial, is regular, and in accordance with the practice of the court. (2)

4. The Superior Court has the power of appreciating for itself the evidence adduced before the jury and, if the verdict be not sustained by the evidence, will set it aside, upon a motion to that effect, and render such judgment as shall be justified by the record. (3)

Semble, that immoral conduct, by keeping a mistress, or frequenting brothels, is a sufficient justification for a refusal to fulfil an agreement to receive the person guilty of it as a partner.

Semble, also that one partner, being a Defendant in the cause, examined under the recent statute in that behalf, may be a good witness for his copartner, any objection going only to his credibility.

This was an action of damages brought for the breach of an alleged agreement by Lyman, Savage & Co., to receive Plaintiff as a partner in their firm. The paper relied on was written and signed by B. Lyman, the senior partner, and was in the following terms:

"Montreal, 4th April, 1857. *Thomas Higginson, Esq.*: DEAR SIR, Touching the conversation the writer had with you, the present is to say that we will allow you £200, say two hundred pounds per annum, and also five per cent., on the profits on the business carried on here, for the next two years, after which time we will admit you as a partner on terms that will be mutually satisfactory. This letter to be strictly private and confidential. Yours very truly, LYMAN, SA-

(1) V. art. 1853 C. C.

(2) V. arf. 422 C. P. C.

(3) V. art. 426, § 13, C. P. C.

VAGE & Co." At the expiration of the period referred to in this letter, Plaintiff, having, a short time previous, received a letter from B. Lyman informing him that he could not recommend his reception into the firm, made a formal request to Defendants to receive him as a partner, which they refused to do. He then instituted his action claiming $25,000, damages, for loss of profits and advantages, and of the position which, being a member of the firm, would have given him. Defendants denied that the letter in question constituted or evidenced any contract with them: alleging that it only expressed B. Lyman's individual intention, which they did not share, and of which they were ignorant, and that, in any case, Plaintiff had been guilty of the immoral and irregular conduct specified in their plea, upon which they relied as a justification for refusing to admit him, even had they ever agreed to do so, which they denied. The questions for the jury were settled by the Court of Appeal as follows: 1. Did Defendants, as a commercial firm, contract with Plaintiff to admit him as a partner, in manner and form, as set forth in the declaration? 2. Have Defendants refused to admit Plaintiff as such partner? 3. Did Plaintiff, between the 4th day of April, 1857, and the 4th day of April, 1859, cohabit openly with a woman of profligate character, and did he maintain her in a state of prostitution? 4. Was Plaintiff bound to remain in charge upon the premises during the night time? 5. Did Plaintiff, during the said period of time, absent himself from Defendant's store, at night, in order to pass his time at brothels? 6. Did he introduce women of bad fame into the said store within the said period? 7. What is Plaintiff's general character, and is he a person of irregular morals and discreditable conversation and repute? 8. Did Plaintiff suffer any damage by reason of not being admitted into the said firm as a partner? If so, at what sum do you assess the damage?"

THE JUDGE'S CHARGE.

Hon. Mr. Justice BADGLEY, said: The magnitude of the amount demanded, and the importance of the legal points involved, compel me to extend my observations somewhat more than I had originally intended in charging the jury. The action seeks the recovery, by Plaintiff, of £6,500, for damages, said to be suffered by him, by reason of Defendant's refusal to admit him into their copartnership firm of Lymans, Clare & Co., as dealers in drugs, &c., at Montreal and elsewhere, in Canada. The declaration sets out that, by a paper writing, dated the 4th April, 1857, written on behalf of Defendants, by Benj. Lyman, one of Defendants, and senior partner of the

firm, and signed with the copartnership name, Defendants agreed to his admission as a partner in their copartnership, which should be permanent and continuous, alleged Plaintiff's refusal of advantageous offers in consequence, states his good business capacity, their refusal to admit him, although often requested, and his privation of profits and advantages from so large and profitable a business, becoming more extended from the 4th April, 1859, estimates the value of his share at £6,500, and concludes that, by means of their refusal to admit him into their copartnership he has been deprived of profits of and avantages from the copartnership business to the amount of £6,500, which he claims with interest and costs suit.

The issues raised by Defendants' pleas, are: 1st The denegation of such an agreement; 2nd Their exemption from such agreement of their partner, being without their consent or participation; and 3rd Hypothetically their relief from such agreement, if it existed, by reason of Plaintiff's misconduct. The written evidence adduced by Plaintiff, consists 1st of the agreement or paper writing referred to in the declaration; and 2nd of two setts of correspondence, the first between Plaintiff and Benjamin Lyman, and the second between Plaintiff and the firm of Lymans, Savage & Co. The first commences with a letter from B. Lyman to Plaintiff written at Toronto, on the 1st April, 1859, in which the writer suggests to Plaintiff that he might get the Medical Hall, as Beers was dead, and that, from circumstances that had come to his. (B. L') knowledge, he will be unable to recommend to his partners Plaintiff's admission into their firm as a partner. On the 2nd April, 1859, Plaintiff acknowledges the receipt of that letter, denies his interference with the contract by any act of his, and asks for an explicit relation to himself, in a private note, of the nature and cause of the charge. His letter of the 16th April, calls B. L's attention to his letter of 2nd April, to which the latter replies on the same day, declaring his own willingness to admit Plaintiff into the firm, upon terms which could be agreed upon between them, and as the other partners should consent to, but for the facts which had come to the knowledge of the writer. The correspondence with the firm then opens, with Plaintiff's letter to them of the last date, 16th April, covering copies of the agreement and of the correspondence above, state his unconsciousness of the action by him to break or forfeit that agreement, and requests that it may be carried out by the other partners and by B. L. himself; on the 28th and 30th, he draws their attention to his note of the 16th instant, and, by the latter, claims their favorable notice of the agreement, under which he is entitled

to ¼ part of the business, as there will now be four partners, and thinks his name should appear at all events as partners, &c., and demands to act as such partner. The reply of the firm, dated 2nd May, denies his assumption of being their partner declares it unfounded within his own knowledge, ignores the existence of such partnership between them and him, qualifies him as their clerk, and finally asserts the existence of insuperable objections against any proposition for his admission into their firm as a partner. On the 3rd May, 1859, this portion of the correspondence closes by Plaintiff's letter, acknowledging the answer of the firm, and intimating his intention to seek a reparation of the injury done to him. The action followed almost immediately, the declaration being dated the 7th May, 1859. The testimony consists of the evidence of Benjamin Lyman and of a few other persons. That of B. Lyman is taken under the authority of a recent statute, 23 Vict., chap. 97, sec. 49, which enables a party in a cause to be brought up and examined and cross-examined as a witness. Benjamin Lyman explains the origin of agreement, which he says was written at Plaintiff's request, and represented his Benjamin Lyman's own feelings towards Plaintiff, but not those of the firm who might not agree to it; told Plaintiff he had not their sanction for it, to which Plaintiff replied if they did not, it would go for nothing; says that the conditions of the two years service at £200 per annum, and the 5 per cent. on the profits *here*, were subsequently carried out, that he had suspicions of Plaintiff's morality in the summer of 1857, proves the correspondence produced, states the gross business of the firm at £75,000 per annum, denies all knowledge of a letter from Plaintiff of 5th April, 1857, accepting his proposal of agreement, asserts that the £1000 was offered by Plaintiff as a loan on call, at interests of 8 per cent., and was only called by a lawyer's letter after the rupture with Plaintiff, he did not tell his partners of the agreement until after his letter of the 1st April, 1859. The 5 per cent. was not entered in the books of the firm until this year, and was unknown to his copartners until Plaintiff's demand to them to take him into partnership. £300 was received by Plaintiff in full for that claim and was charged to Benjamin Lyman's private account, as having been proposed by him without their consent. Heard of a copartnership spoken of between Plaintiff and late Wm. Lyman, Plaintiff said Wm. Lyman could not succeed, never heard that Plaintiff could have had the Medical Hall. Plaintiff's salary, at £200 per annum, was credited to Plaintiff, and, at his departure, his account was made up by the bookkeeper, who had been directed by witness, about time of his Benjamin Lyman's departure

for England, to credit Plaintiff with the £200 per annum. Did not notify Plaintiff, in 1857, of his conduct, or previous to 1859, never tendered the £1000 or the 5 per cent., for which separate actions were brought. The latter was paid in 1860. That account of profits could not be made up before. Admits the good business capacity of Plaintiff. Mr. Workman testifies to having seen the letter of the 4th of April, 1857, about that date, received it from Plaintiff, and kept it in his possession for a year, states that Plaintiff had prospects of business connection with the late Wm. Lyman, by whom he was requested to speak to Plaintiff about a connection; a connection was also proposed or spoken of with Mr. Carter, but advised Plaintiff to continue with his house, and to get any offer of partnership in writing, mentions that a part of the £1000 paid over to Lymans, Savage & Co., £700 was held by the late firm of witness, only paid 6 per cent on the £700 being, partly Plaintiff's, and partly his father's money. Mr. Carter testifies to his willingness to have received Plaintiff into the share of Medical Hall business. Defendants business largest of the kind in the province, the good will, a year's profits, not profits of a fair business, that is wholesale and retail, was executor of late Wm. Lyman's estate to which Defendants had to pay £18 to £20,000. Mr. Sinclair was aware of offers made to Plaintiff from Defendant and others, and advised him to accept the former, did not see the letter of proposal. Mr. Spence saw Defendants' letter and Plaintiff's reply in a copy, shortly after his receipt of the original document signed Lymans, Savage & Co.; on a Sunday, in Defendants' store, shortly after seeing Defendants' letter, Plaintiff said "There is my answer to their letter lying on the desk," did not read it, read a copy, draft of reply shewn to him by Plaintiff, none of Defendants present at the time, nor any one in Defendants employ, Plaintiff had key of the premises, and apparently in charge of them. Mr. Lamplough estimates the good will of Defendants' business at from £8,000 to £10,000. With this evidence, such as it is, Plaintiff closed his case. The evidence advanced by Defendants refers mainly to Defendants' conduct in connection with a woman named Martha Scott, his nightly and untimely absence from Defendants' premises, of which he had charge and in which he had an apartment provided for him to sleep at night, his visits to houses of ill-fame, and his connection with the woman above named. It is unnecessary, at this time, to detail this testimony with more particularity; it will be fresh in your recollection, and you will be able to supply omissions; it may be observed, however, that it is of a positive and direct character, that, O'Leary's testimony stating Savage's application to him, on the 28th May, 1857, with

reference to Plaintiff's conduct is confirmatory of the testimony of Benjamin Lyman as to suspicions of the firm against Plaintiff in the summer of that year and whilst in their employ. As to the evidence of Mr. Clare, the material parts shew that Plaintiff never spoke to him of his partnership with the firm, that the letter of the 5th April, 1859 was not seen by him, that the £1000 was a loan on call at 8 per cent, offered by Plaintiff himself, and that Plaintiff had a sleeping apartment in the premises, without charge and had charge of the premises, that the two Messrs. Lymans had each a key, and Plaintiff the third one, that Plaintiff had ready access to the books, made no complaint in regard to his account until about the time of his departure, on the 4th May, 1859; states the annual profits, from 1855 to 1859 both inclusive, to average about £4,000 or £5,000 per annum subject to bad debts. Large increase of business since 1859; states Plaintiff's absence on the business of the firm for two months, in 1855, and two days, in 1856. Cannot swear if his sleeping apartment was occupied by any one else, during Plaintiff's absence, would have seen the letter spoken off by Spence, if it had been lying on the desk. The $1200 paid to Plaintiff, for the 5 per cent. claim, was charged to B. L., on account of refusal of other partners to allow it, &c. The balance of 1858 was made up to 1st January, in May or June of that year, that of 1859 is not yet made up. The evidence of Defendants, was closed, and Plaintiff adduced evidence in rebuttal. B. L. was again brought forward to establish Plaintiff's intimacy with his family. Darling proves Plaintiff lodging several times at the Ottawa Hotel in latter part of 1858-59. Thomas Higginson, Plaintiff's father, was intimate and friendly with Defendants. Never was told by them of his son's conduct until after the rupture, often visited by Plaintiff at the Ottawa Hotel, when witness and wife came to town, and that they visited his son at his room, at the store, but not late at night. With this evidence for the defence which has been gone over cursorily, including that of B. L., of which evidence Plaintiff avails himself under the statute, it will be for the jury to render their verdict upon the suggestions submitted for their consideration. It is proper to observe that the statute has introduced nothing new in the matter of the examination of a party except the mode of it, under the former law, the party was examined upon interrogatories, now by the statute, he is examined and cross-examined as a witness, but, as to himself, the result is the same by both laws, he cannot turn his evidence to his own advantage. It is proper to premise *in limine*, before stating to you the law of the case, that both judge and jury have particular duties to perform in such cases as this. Their respective provinces are sufficiently

distinct to enable both to keep apart from each in their respective functions. In a general way, it is the duty of the judge to point out to the jury any rule of law which either renders evidence necessary, or gives peculiar weight to one species of evidence, or defines the manner in which a certain fact must be proved. He should also distinctly explain to the jury, what principles of law are applicable to the point in issue, and, in order to enable him to do so correctly, he must distinguish questions of law from questions of fact. In matters of contracts, the construction rests with the court alone. On the other hand, it is the duty of the jury to take the construction from the court, either absolutely or conditionally, according as the words of the contract and the surrounding circumstances require, or not, to be ascertained as facts by the jury. In matters of law also, it is scarcely necessary to observe that juries must take the law from the judge and not from their own opinions; unless this were so, there would be no certainty in the law, for a misconstruction by the court is the proper subject for redress by a high tribunal. such as a Court of Error or Appeal, but a misconstruction by a jury cannot be set right at all effectually. Bearing these observations in mind, it is my duty to state to you the law in connection with the issues and evidence of record. It will be in your recollection that there were three issues noticed to you upon the pleadings filed in this cause. 1° The absoluteness of imperfection of the agreement relied upon by Plaintiff. 2° The legal power of one partner of a firm to introduce a person as a partner into the firm, without the sanction of his copartners, and 3rdly the dissolution of an existing copartnership, or of a contract for the formation of one, by the misconduct of an actual partner or of the intended partner; this last issue is hypothetical. As subsidiary to these, it may be necessary to advert to the legal means required for establishing the damages demanded and sought to be recovered. As before observed, Plaintiff relies upon an absolute agreement between himself and Defendants, as copartners, under the firm of Lymans, Savage & Co., which is in the following terms, and must be taken in its own words, as they are on the face of this instrument itself, and not as it appears in Plaintiff's declaration. It may be at once observed that no legal evidence has been adduced by Plaintiff of his acceptance of this agreement. The copy of a letter dated the 5th April, 1857, seen by Mr. Spence, as he says, shortly after Plaintiff's receipt of the alleged agreement, and Plaintiff's pointing to a letter lying on the office desk and saying " There is my answer " are not in themselves proof of the existence of the original letter under that date. No such letter is known to Mr. B. Lyman, or to the witness Clare, who would have seen it, had it been

on the office desk as stated. Plaintiff ever mentioned, either the agreement or his acceptance of it to his fellow clerk, Clare, and has not, in any way, adverted to it, as part of his case, it is not referred to in his declaration, no copy of that letter of acceptance was transmitted by him to the firm, under cover of his letter of the 16th of April, 1859, nor is it mentioned in any part of his correspondence with the firm, or made known to them, until after his proceeding at law against them. The copy offered in evidence by Plaintiff is not proof; it is only secondary evidence which cannot be admitted without first showing the previous existence of the original, and its non-production after notice. The discrepancy, in Mr. Spence's testimony, as to the Sunday on which he says he saw this copy is not important, except as to the date of the letter of acceptance. It might have been the second day, or some time after, but not the first sunday. The agreement was written on Saturday, the 4th of April, it was written in the afternoon, and Plaintiff consulted several of his friends: the answer would scarcely be the 5th of April. Plaintiff's counsel has presented this agreement to the court and jury, as a proposal of agreement, if so, it only becomes binding and absolute upon its proved acceptance which has not been shown; if it was such a proposal, it was competent for the proposer to retract and withdraw it, until after its acceptance, until that even, it was imperfect as an agreement. It is a clear principle of law that the parties to a mutual contract of bargain must mutually consent, and that consent must be made known in some way or manner recognized by the law. The terms of the agreement show its imperfectness as a copartnership contract, the principal elements of such a contract are wanting, the terms, conditions and duration and the copartnership, the shares of the partners respectively their advances or otherwise to the business, the partnership name, and all this moreover with the statement written in the agreement itself, that Plaintiff's admission was on terms to be agreed upon. Plaintiff's counsel has also qualified it as an offer for entertaining a proposal of copartnership, but so again it is not a contract, and manifestly it is not a contract absolute in itself and in its own terms. Upon this first issue therefore it is my duty to tell you that the paper writing produced in support of Plaintiff's action is not, in the face of the agreement, binding in law upon the firm of Lymans, Savage & Co., or upon Defendants. We have now reached the second issue, which embraces a very interesting point of copartnership law, which the jury will receive from the court, inasmuch as but little matter of fact that is uncontradicted, is connected with it, and is, that the proposal was written by B. Lyman, the senior partner of the firm, and that it

was signed with the copartnership name. This issue involves the entire question of the nature and establishment of partnerships, the powers of individual partners, particularly to introduce third persons into their subsisting copartnership, and to use the copartnership name. The law which is clear and explicit upon all these points will be found in standard authorities which will be given in their own language as more explicit and plain than my own. It must be premised that a general concurrence of opinion exists among law writers upon the subject, in England and Scotland, France, the United States and this province. The contract of partnership is defined by Story, *on copartnership*, sec. 2, to be " a voluntary contract between two or more competent persons to place their money, effects, labour and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of profits thereof between them." Pothier, *Contrat de société*, n°s 5, 11, 12 : " C'est un contrat, &c., it is a contract formed by the consent alone of the parties : it is essential to the contract that the partnership be established for the common interest of the parties, each hoping to have a share or part in proportion to what he shall have brought into it." Delangle, *Tr. de la société* : " La société naît de la volonté des parties, &c." Similar authorities will be found in Domat, Bk. 1, n° 801; Code civil, art. 1842, Collyer, *on partnership*, part, 182. The contract of partnership being therefore especially and altogether dependent for its existence upon the consent of each of the parties, is eminently exclusive in its nature and character; hence, it is an established principle of law (Story, n° 5) " that, as it can only commence by the voluntary consent of the parties, so, when it is once formed, no third person can be afterwards introduced into the firm as a partner, without the concurrence of all the parties who compose the original firm. It is not sufficient to constitute the new relation that one or more of the firm, shall have assented to this introduction, for the dissent of a single partner will exclude him, since it would in effect amount to a right of one or more of the partners to change the nature, the terms and obligations of the original contract, and to take away the *delectus personæ* which is essential to the constitution of a copartnership." So also, Collyer, n° 8 : " And first, the contract must be voluntary, therefore, no stranger can be introduced into a firm as a partner without the concurrence of the whole firm ; this *delectus personæ* is so essentially necessary to the construction of a partnership that, even the executors and representatives of a deceased partner themselves do not, as such, succeed to the state and condition of partners," a special contract to the effect is required. So also is the law of Scotland, Bell's Comment :

Pothier, n° 91, says: "Chacun des associés, &c., each of the copartners having the right to dispose of the partnership effects only for his own share therein, he may, in consequence, without the consent of his copartners, unite to himself a third person, in his own share of the partnership, but without their consent, he cannot unite him with the copartnership. Wherefore, if I think proper to unite a third person to myself, he will be my partner in my share of the partnership which was established between us, but having no right to bring him into our partnership without your consent, except for my own part, he will not be your partner, because the rule of law *socii mei socius meus socius non est*. In n° 95, Pothier goes on to say that "even if the partner had the sole and entire management of the business, he cannot, of himself, make a third person a partner of the firm, as to give to his partners a partner whom they have not chosen, exceeds the bounds of the simple administration of copartnership property." Delangle, No 194, says: "In civil and commercial partnership, in which the choice of persons is one of the principal elements of their constitution, no partner can, without a stipulation to that effect, or without the consent of his copartners, substitute his assignee in his place. The consent is determined by and rests upon the social position, the morality, solvency, and intelligence of the parties. No contractor, partner, can, of his own will, modify the conditions under the faith of which the partnership was formed." Troplong, *Tr. de soc.*, No 755, observes: "A partner, in a civil or commercial partnership, may give himself a partner in his own partnership share. This subpartner is not a member of the first partnership; his admission into the partner's share form a particular and distinct copartnership, independent of the original one," and, 4 Pardessus, 973, says: "It is the essential part of a partnership for the partners to choose each other. None can force his copartner to receive in his place any person to whom he may have assigned the whole or part of his rights in the copartnership, nor even if he were sole manager of the business can he admit a new partner without the consent of the old one; that admission, whenever it may occur, must, in principle, be the result of an unanimous consent an dwill. The majority cannot govern the minority in this, although he or they who compose the latter, should state no reason or ground for refusing, and the opposition against such refusal could not support a contestation in law, upon which a judgment could be rendered to compel the acceptance of the new partner." So also Duvergier, No 373, who, after going over the same ground, thus concludes: "Personal confidence is the root of the contract, and the friend of my partner may not possess my confidence."

It must too be admitted, by both judge and jury, as well settled to require any comment, that, in principle and in law, when a partnership is once formed, no third person can be afterwards admitted or introduced into the firm as a partner without the occurrence of all the partners who compose the original firm. But it may be said that the partnership signature to the proposal made to the Plaintiff binds the firm. The authorities already cited are too precise and perspicuous to be set aside by any implication to be derived from the use of the copartnership signature by any of the parties. It is true that the individual partners are the mandataires of their firm and and of each other, and that equal authority is given by the law to each to act for all; but that administrative power is limited within the copartnership's transactions for which the partnership itself was formed and constituted. Pothier, at No. 66 says: "This power consists in making all necessary agreements for the partnership selling the goods, receiving the monies from sales, &c. 2. Troplong says every civil and commercial copartnership, has a precise and settled object, which the manager is bound to carry out in virtue of the duties of his functions." No. 712: "Each partner has the right of managing the partnership affairs, he is presumed to have received from the copartnership a mandate to manage and administer under the control of his copartners for the advantage of the undertaking. This tacit mandate, a consequence of the confidence between them, comprehends the powers contained in a general procuration to purchase, sell, pay, receive, &c., the copartnership effects;" and, at No 908, an express power to the partners in such commercial partnerships is more easily presumed, the interests of commerce have so established it. The partners are presumed by the mere fact of their association together to be mandatories for each other, to have given to each other the power of binding themselves and them, jointly *solidairement*, and indefinitely, for all the legitimate objects of the copartnership; and, within the sphere of that adminstration, each partner has an implicit mandate from his copartners to treat with third persons." So also Duvergier, 385, and Delangle, No 126-128, this last author restrains the power to the *appréciation des actes et des faits relatifs à l'exploitation des affaires sociales*. The English authorities are equally plain and positive on this point. Story No 94, observes: "In virtue of this community of rights and interests in the partnership funds, stock and effects, such partner possesses full power and authority to sell, pledge, or otherwise, dispose of the entirety of any particular goods or other personal effects belonging to the partnership, within the scope of his partnership, he is properly deemed to do such acts as their agent, and as the ac-

credited representative of the firm." Collyer, No 384: "One partner has an implied authority to bind the firm by contracts relating to the partnership; he may draw, endorse, &c., and do any other acts and enter into any contracts in reference to the business of the firm which are incident or appropriate to such business, according to the ordinary course or usage thereof." See also Gow, on Part., p. 32. Now this power is essential to the well conducting of commercial transactions and is necessarily implied in the very existence of partnerships: that implication however carries with it its own limitation and restriction, and comprises its application to the business of the firm, the actual concerns of the partnership for which it was established and formed; under no circumstances, can this power be extended or presumed to extend to the formation of new partnerships, or the admission of strangers into old ones, these are not the objects nor the business of the subsisting copartners. Where could this abusive power be stopped, if it were once allowed to operate. If one stranger could be introduced, twenty might, by the same rule, and the shares and capitals of the original partners would be materially changed from those contemplated by the original contract; in fact their capitals, original or acquired, might be divested by the participation of strangers without capital or capacity. There is but one mode of maintaining an introduced partner of this kind as a member of a firm and that is the acquiescence of the other partners, if that be expressed, his adoption is perfect, but it may also be implied from the acts of the partners themselves, as if the other partners choose to adopt his acts as a partner, if they choose to adopt managements made by him as their partner *ex. gra.* by joining in an action for a demand subsequently contracted, they may do so, and the action will be maintained and it becomes the action of the firm, 1 Hill Rep. But, knowledge is not enough, acquiescence in the acts of the person so intended to be admitted as a partner must be clearly and positively brought home to all the other partners in order to bind them. The introduction of a third person into a firm is a contract with each of the partners to which each must consent individually, and it may be said that there are as many contracts as there are partners. Nor will the approbation of the managing partner alone suffice nor is the mere knowledge by the other partners of the acts of their partner sufficient. Knowledge is not aquiescence nor can any legal inference in support of their partners act be drawn or allowed from their knowledge or their silence upon the subject during the interval until the time of when the contract might be expected to take effect. Acts and words may be sufficient to constitute a copartnership contract, when they are those of all the partners and shew an acceptance by the partners,

therefore, to bind them. Evidence of this acceptance is required. 6 Madd : 5 Jac., 284. If the contract attempted to be enforced against a firm, in its inception, secured their sanction and countenance, the joint obligation attaching upon them to perform it is plain and manifest as a general principle. Each member is necessarily presumed to participate in the expected or resulting benefits of such a contract, and to countervail that advantage, the joint duty obliging them to fulfil it, is imposed ; such an engagement by the firm in no respect differs from that of a single member, the only difference is in the number of the parties, the consequence and responsibilities which ensue upon a breach of it are precisely the same, but, where the inception of the contract was unknown to the other partners, who rejected it upon the arrival of the period when it was to take effect, and no evidence of their acceptance was given by act or word, and no acquiescence shewn, their responsibilities are their own, and whether the other partners be many or few, they are in no way compelled to fulfil what they have not sanctioned. It has been argued that the payment of the 5 per cent. on the profits here allowed to the Plaintiffs, during the two years mentioned in the proposal of agreement, is a sanction of it by the other partners. The circumstances attending the inception of that matter are within your recollection ; the charge was unknown to the other partners until after the rupture, it was never entered in the partnership books until after the event. Mr. Clare the bookkeeper, was not aware of it, until, on being required to make out Plaintiff's account, after the rupture, the latter, for the first time, objected, because the 5 percent. had not been credited to him; he never previously had objected to the entries in the books to his credit, although he had free access to them. Moreover, so far from acquiescing in this charge, the other partners immediately compelled B. L., the proposing partner, to charge himself with the sum received by Plaintiff, in discharge of that claim, because he had proposed it without their sanction, and, further, it was not paid until 1860. The payment of the 5 per cent. is no proof of the sanction of Defendants, and does not bind them or him. Upon this issue, how stands the case, the paper writing produced by Plaintiff shews it to be the act of the writer B. L., alone, who, on Plaintiff's application, proposes to him a continuance of his service with the firm, for two years, at an increased rate of wages, instead of £150, £200 per annum, with 5 per cent. on the profits *here*, that is, in Montreal, after that time, the writer proposes to Plaintiff his admission into the firm, upon terms to be agreed upon, and to be mutually satisfactory. This was to take place after the two years: this proposal had never been communicated to the other partners, H. Lyman or Savage, either by B. L., or

what is more strange, by Plaintiff himself, until his demand of admission into the firm, although B. L. informed him he had not his partners' sanction for making the proposal. Until that time, there is no approach to evidence, even to their knowledge of this proposal, much less of their acceptance of the agreement, or the acquiescence in it, by either of them, by word or act, Plaintiff is not only silent upon this important subject with the partners, but he is equally so with Clare, there is no proof of his having done, or been concerned in any partnership act which the copartners had adopted, or of his having been considered by them in any other quality than their clerk and manager as before the rupture. The law refuses to compel non-consenting partners to submit to proposals of this character, whilst it denies to the partnership signature subscribed by one partner for objects beyond the scope of the partnership business, and mandate and effect whatever, no general procuration, however large, can validate it. Take away from this case the assumed power of one partner to bind his copartners in this matter, and remove any legal responsibility which could be supposed to have arisen from the use of the partnership name to the abuse of the partnership mandate, and it will be manifest that you cannot fail to perceive, by a recurrence to Plaintiff's testimony, in support of his case in chief, that there is no case for you, this issue is clearly against Plaintiff. To maintain it in his favour would be against law, as it would be against principle, it would give rise to contentions subversive of a copartnership system altogether, it is my duty to state this to you who are commercial men, engaged in commercial pursuits, and possibly some of you connected with partnerships for your consideration. The law has settled the point as I have endeavoured to explain it to you, and it ignores all acts such as this of individual partners upon the responsibility of copartners, either as to all or any of them ; hence it necessarily follows that, if the agreement were perfect, which it is not, no responsibility in Plaintiff's favour is cast upon the firm of Lymans, Savage & Co., or upon Defendants as partners of that firm by the act of B. Lyman. Upon these two main issues, Plaintiff must rest upon his own strength for success ; as regards Plaintiff, there is nothing to support the case, either in evidence or in law. I had hoped to have discharged you yesterday, at the close of Plaintiff's evidence : had Defendants then moved for a nonsuit, I should not have hesitated to grant the application, but, although the legal aspect of the case since then is quite unchanged, subsequent proceedings have been adopted which now compel me to submit to you the third or hypothetical issue together with the law affecting it. It is not my purpose,

at present, to detail the evidence adduced on this part of the case, it must be still in your recollection, and I shall therefore confine myself to remark that it appears to sustain the complaints made by Defendants; this, however, is for your consideration the sum of that testimony is as follows: that Plaintiff had kept Martha Scott for several years past, and during the time of his service with Defendants, and especially during the two years mentioned in the proposal; that she has had two children, during his connection with her, and that a third is coming. That this woman and her sister lived with their mother until the last four years, that the latter keeps a bawdy house, that living next door to their mother's house they go backwards and forwards to her frequently; that Plaintiff has frequented the mother's house, and also that one Emilie Duval, where he appears to have been connected some time since with the girl McGuire; that he has frequently left his employers' premises, intrusted to his charge, and spent his nights in these places, with other facts and circumstances that I need not repeat. These are facts sworn to and proved before you, and, moreover, about in so many words admitted and commented by Plaintiff's counsel. If you can bring your minds to consider them as things of no importance, as mere venial errors, conduct not disreputable in itself, which should not debar a person from entering into partnership with respectable firms, or with any of yourselves, should you be placed in such circumstances, or with any other respectable persons, you will declare it by your verdict; on this point, you are the judges of the fact, and the decision rests with you. You must bring the matter home to yourselves, in what way such conduct should be considered by you. I have only now to state to you the law upon the subject of a partner's misconduct, and its result. Admitting, for argument sake, that a partnership did actually exist, with a partner guilty of misconduct, his copartners, with all their business responsibilities upon them, must have some means of escaping from his connection, and here the law comes to their assistance against the party himself, who might attempt to enforce the continuance of the copartnership, or the binding nature of an executory contract. The dissolution of the contract of partnership, it is admitted by the law of England, for a variety of considerations. Where the period of the partnership is unlimited, it is a partnership at will, and, in such case, it is competent for any partner, at any time, to withdraw from it and dissolve the partnerhip. Hence, Story, n° 271, says: " A partnership at will, may be dissolved, not only by a positive or express renunciation thereof by one partner, but, also, by implication from his acts and conduct,

whether by acts or in writing." So also, Collyer, nº 105 ; So Bell's Comment, B. 7, ch. 2, p. 631-2. The French law has similar principles and doctrine, Pothier, 65. De Langle, nº 662, says : "La loi, &c." The law allows every partner to free himself from the servitude of an unlimited partnership, and it is enough for him to manifest his inclination, at once to dissolve all the links that connect him with the partnership, provided that he does not take advantage of the occasion to enrich himself by the detriment of his co partners or to cause them damage. Section 2, Troplong, nº 911. The same freedom, however, is not assured for limited partnership : In those cases, ground must be shewn for making the demand, such, according to English law, is bankruptcy, insanity, or other real or just ground fnr giving the required redress by a Court of Equity. This jurisdiction is of a most extensive and beneficial character, and may declare partnerships void *ab initio* or decree their dissolution from the date of the decree. In this category of grounds for dissolution, are the misconduct, fraud or violation of duty of a partner, but every trivial departure from duty or violation of the articles of partnership, or every trifling fault or misconduct, will not set these courts in operation, such as mere defects of temper, casual disputes, difference of opinion and other minor grievances, which may be somewhat inconvenient and annoying, but do not essentially obstruct or destroy the ordinary rights, interest or operations of parnership. Story, nº 287 : "On the other hand if a case of gross misconduct, abuse of authority, gross want of good faith or diligence, such as is and must be productive of serious injury to the success and prosperity of the business of the partnership, Courts of Equity will interfere. Habitual intoxication, gross extravagance or negligence would lead to a like result. But a strong and clear case must be made out of positive or meditated abuse. There must be an unequivocal demonstration by overt acts or gross departures from duty that the danger is imminent or the injury accomplished. For minor misconduct or grievances, if redress be required, the courts will go no further than to act upon the guilty or faulty party by way of injunction." Gow, p. 227, Collyer, p. 227 : "Though the court stand neuter, with respect to occasional breaches of agreement between partners which are not so grievous as to make it impossible for the partnership to continue, yet, when they find that the acts complained of are of a character that relief cannot be given, except by a dissolution, the court will so decree, though it is not especially asked." You will observe that these remarks apply to actual parnership, where the existing contract is dissolved, and it does appear reasonable that it should be so whenever the object of the partnership are

no longer attainable, or the partner's misconduct so seriously mischievous that it ought not to be tolerated. Now, if this be judicial action upon a perfect and subsisting contract, how much more should it apply to intended and imperfect contracts, and, thereby prevent parties coming together as partners only to be separated." The french law offers similar principles, Delangle, n° 673 : " Mais la Société, &c., but the partnership, like all other conventions, may cease before its terms, if the state of things become such, that the object originally contemplated by the partners can not be attained, as if the conduct of one of the partners casts discredit upon the partnership, *si ita injuriosus aut damnosus socius sit ut, non expediat eum pati*, also, Pothier, 152, 2 Troplong, 983, who says: "Judges should notice the changes which destroy thath armony which is necessary for the prosperity of the partnership, they must consider the personal habits, the disposition, the character whose influence of no consideration in other contracts, is so great in this marriage or union of civil and commercial interests. Union gives them strength, but discord ruins the best formed enterprizes; discord among copartners is then a serious cause for the dissolution of their partnership; the same result follows from every thing that shake the confidence placed in the personal qualities of a partner charged and intrusted with a part of the partnership's action. The mutual confidence of partners among themselves respectively is the true link of the contract of copartnership. That the partner who shall have become a gambler, a dissipated, *prodigue*, spendthrift, and he whose ill conduct, unknown at the time of the contract, but since then revealed, would occasion serious apprehensions as to his administration of the copartnership. " So, also, Duvergier, p. 393, 575 : " La confiance, &c., personal confidence is the basis of the contracts of partnership. If the conduct of a partner be such that this confidence can no longer subsist in the minds of his copartners, *ex. gra.* if he commit repeated faults, a dissolution of partnership may be demanded against him. He promised to be careful and honest, he fails in his engagements, his partners are discharged from him. It is not from their intercourse with each other alone that the morality of partners is to be appreciated, acts and matters foreign to the copartnership business which might take from one of them the consideration which he enjoyed at the formation of the partnership, will justify a demand for its dissolution. Who would condemn honourable and reputable men to the penalty of a perpetual contrast with a man stigmatized by judicial condemnations or by public opinion ? The gravity of the facts, the nature and frequency of the intercourse required by the special character of the

contract of partnership should be weighed by the judges, and, if they consider that the partnership bond has become insupportable from the faults of one of the partners who formed it, they will order it to be dissolved." It would be poor sophistry to deny the applicability of these authorities to the case in hand, simply because they refer in terms to existing partnerships; they apply as well to contracts of copartnership about to be entered into, and justify the Defendants if justification were needed, that Plaintiff's conduct, before his entry into the copartnership, would be a fair sample of what it would be after. But, we are left in no doubt upon the effect of the law, inasmuch as the Court of Appeals has itself settled the special questions suggested for your answers and has given to them a legal significance, and purport that cannot be contradicted or diminished. You have the case before you in the fact of an old and long established firm having had a young man in their service for a considerable period of time Upon his natural application to the senior partner, who appears to have entertained a strong personal regard for him to know what he proposed to do for him, the partner stated to him his own views and feelings towards him and which, at the request of the applicant, he put into writing and, as it happened, signed the writing with the partnership signature, but intimating at the same time that he had not the sanction of his copartners, Plaintiff's other employers, which applicant was to obtain. The writing secured an increase of salary from £150 to £200 per annum, and 5 per cent. on the profits of the business at Montreal, and proposed his admission into the firm after two years upon terms to be settled. No knowledge by H. Lyman and Savage of this proposal until the rupture had occurred, or acquiescence in it by them either by word or act, at any time is in evidence; the law invalidates this unauthorized proposal of one partner, and nullifies the partnership signature subscribed by him, thereby relieving them and the firm from any liability or responsibility towards Plaintiff, for the nonfulfilment of the agreement by reason whereof he claims damages for loss of profits and advantages from the business of the firm. But what profits? Of those of a partnership at will which has not existed at all, and which if it had existed any partner might dissolve at his pleasure, or refuse to carry it into effect, if only intended to be established, or those of a limited partnership brought to dissolution by the misconduct of any of the copartners. In this case, there is no partnership at all, no privity of contract between Plaintiff and Defendants. He was no partner in their firm, had no control or right in its management, nor under any responsibily for its engagements or losses; in fact, there is neither a

contract nor agreement between them, nor foundation for a claim to damages against them, and, therefore, if profits be the measure of damages, no profits in the business of the firm for his participation or distribution. Plaintiff's case is one of not unfrequent occurrence at law, that of a person contracting with one without authority, he must himself bear the result. Under this view of the case, there can be no assessment of damages against Defendants. Before I close this case, it is proper to refer to one or two circumstances that have been mentioned in the course of the trial: but you must bear in mind that, in coming to a decision upon the points to be submitted to you, that the reckless assertion of counsel, their suppositions or beliefs are not to be taken as proofs, and though they may move feelings, the right of parties are to be decided upon the evidence adduced before you. The counsel, in stating his case, represented the paper writing first as a proposal for agreement, you must be reminded that, if it was so, by his own showing, it is not an absolute contract in itself, and secondly he represented it as only entertaining a proposal for an agreement, in this case, the law requires it to be accepted; in the former case, it is no contract and cannot support damages, in the letter, the acceptance being not proved cannot support the action. It has been asserted that there has been error in the ruling rejecting the testimony of Duval, there is none in fact, but, if there were, it is not matter for the jury to pass upon, the testimony rejected was not testimony in rebuttal of Defendant's evidenee. The evidence of Turnout, a witness for Defendant, has also been questioned, and an attempt has been made to discredit his testimony. Lee and Renehan have been brought up for the purpose. The latter says nothing at all, and the former, Lee, speaks as to Turnout driving a prostitute in his cab, and getting a small bottle of essence for her at a druggist's. If that were an impropriety in a cabman, it is not an indication of his being generally unworthy of belief, impropriety of conduct such as his, if it even be improper, is no indication of perjury, it may as well be said that impurity of conduct would be perjury. Formerly two witnesses were ne essary in perjury, because there would be no more than one oath against another in a matter of perjury, but though that strictness has long been relaxed, the evidence must more than counterbalance the oath of the witness, therefore, an opposing witness will not avail against a fact sworn to unless corroborated by other independent circumstances. Now, Lee has not opposed any fact sworn to by Turnout, but draws his conclusions from the bottle of essence. Turnout's evidence has been supported by others and has been well nigh admitted by the Defendants' counsel. It has also been asserted

that the woman with whom Plaintiff had connection was not impure. She lives in a house having brothels on each side; she was backwards and forwards to the house of her mother who kept a brothel, and have lived with her mother, for years before, when her mother was in the same line of business. The old proverb applies to her," we are known by our acquaintance." Her character is for your consideration, not mine. As before stated, the appreciation of this testimony is for you, not for me. It is for you to answer the suggestions that are submitted for your verdict, as you may see fit. I have only to add, that, in law, no contract with Defendants in Plaintiff's favour has been proved in any manner against them."

The jury found unqualifiedly in favour of Plaintiff, upon all the questions submitted to them; except the 3rd, which they answered as follows:

" According to the evidence, Plaintiff visited one Martha " Scott, a woman of doubtful character, but there is no proof " of his having cohabited with her, or maintained her in a " state of prostitution," and they assessed the damages at $6,500. On the 20th November, 1860, ABBOTT, for Defendants, followed by BETHUNE, moved that the verdict of the jury be disregarded and set aside, and that Plaintiff's action be dismissed; or, in the event of Plaintiff not being entitled to the dismissal of the action, that a new trial be granted. The points relied on were that there was no evidence of any contract with the firm of Lymans, Savage & Co.; that the paper put in evidence, had never been accepted, but that if accepted it could afford no basis for any assessment of damages, not containing any terms, and contemplating a subsequent negotiation to settle the terms. It was also urged that the court had the power of receiving an application of the kind in question, that jurisdiction flowing naturally from the Act 14 et 15 Vict., cap. 89, and having been assumed by both the Superior Court and the Court of Queen's Bench, ever since the passing of that act.

JOHNSON, Q. C., and CROSS, for Plaintiff, took issue with the counsel for Defendants upon every one of the points urged, and contended that, though the paper of itself did not constitute an agreement, unless its execution were sanctioned by the other partners, yet, such sanction was to be implied from the circumstances of the case: that the law furnished the rule as to shares in and duration of a partnership, when the parties had omitted to regulate them, and that the jury might with propriety include prospective damages, the value of the good-will of the business and the like, in their estimate. They further urged that the court had no right to assume the power of dismissing the action contrary to the ver-

dict of the jury. Upon this point Defendant's counsel cited the following cases, which, they contended, afforded instances of the exercise of this power by the Superior Court, at Montreal and Quebec, and by the Court of Queen's Bench, on various grounds: sometimes upon the verdict; sometimes, partly upon the verdict and partly upon the evidence; sometimes upon the law alone; sometimes upon an appreciation of the evidence alone, viz.: *Casey* vs. *Goldsmid,* 3 *R. J. R. Q.*, p. 144; *Ferguson* vs. *Gilmour,* 4 *R. J. R. Q.*, p. 64; *David* vs. *Thomas,* 5 *R. J. R. Q.*, p. 427. And, as showing the interpretation given to the statute by the Court of Appeals, the cases of *Shaw* vs. *Meikleham,* 3rd Jurist., 5.

The parties were heard, and, on the 27th November, MONK, J., rendering judgment upon the motion, said:

"This case is before the court on two motions by Defendants, one to set aside the verdict of the jury and to dismiss the action, and the other for a new trial. These motions are combined in one, and presented in an alternative form, that is, the Defendants move to set aside the verdict and to dismiss the action, and, in the event of the court refusing to grant that motion, they move that a new trial of the issues be granted. This mode of offering two or more motions, in an alternative form, seems to have been sanctioned by this court, and also by the Court of Appeals. Being sanctioned by precedent, the court holds that the proceeding adopted by Defendants is regular. Ten reasons are assigned in support of these motions, and, in the view of the law and the practice of our courts taken by Defendants, these reasons are applicable to both. Before examining the validity of these reasons, it may not be amiss to state briefly the grounds upon which motions for a new trial, in arrest of judgment, and for judgment *non obstante veredicto* are based, and the reasons, in law and in fact usually urged in support of such motions respectively, and, in doing so, I shall speak more particularly of the law as it stood previous to the introduction of our Statute 14 and 15 Vic., cap. 89. The ground of a motion for new trial may be any irregularity in the proceedings connected with the trial, or any matter extrinsic to the record, shewing that the trial may have been in due form, yet that it has not done justice between the parties. For instance, where it appears, by the judge's notes of testimony, that the jury have brought in a verdict without or contrary to evidence, that illegal evidence has been adduced, or that legal evidence has been overruled and refused; that exorbitant damages have been given, or that the judge himself has misdirected the jury, so that they found an unjustifiable verdict. For these and similar reasons, it is competent to the unsuccessful party to move that the verdict

which has been given, be set aside and a new trial had. Arrests of judgment arise from intrinsic causes appearing on the face of the record as, if in an action for slanderous words, Defendant denies the words and issue is joined thereon, if a verdict be found for Plaintiff that the words were actually spoken, the fact is established; yet Defendant may move in arrest of judgment, that the words are not in their nature actionable, and, if the court be of that opinion, judgment is arrested and reversed for Plaintiff, and it is an invariable rule that whatever is alleged in arrest of judgment must be such matter as upon demurrer would have overturned the action. But the rule will not hold *e converso*, that everything that may be alleged as cause of demurrer will be good in arrest of judgment; for, merely *formal* objections which might have been sufficient ground of demurrer will be cured or aided by verdict, by it the facts are ascertained which before, from the inaccuracy of the pleadings, might be dubious. The motion for judgment *non obstante veredicto* is also made by reason of some intrinsic objection apparent on the face of record, but differs, in this particular, from the motion in arrest of judgment, that it is made on the part of Plaintiff, and not usually on the part of Defendant. It is accordingly grounded, when made by Plaintiff, on an objection to the pleading of the latter. Thus, when the plea confesses and attempts to avoid the declaration, by some matter, which amounts to no sufficient avoidance of it, in point of law, and Plaintiff, instead of demurring, has taken issue upon the truth of the plea in fact, and that a verdict has been found for Defendant, yet Plaintiff may move that, without regard to the verdict, the judgment be given in his favor, notwithstanding the verdict, for the plea having confessed it by an allegation which, though true in fact, is bad in law, it appears upon the whole, that Plaintiff is entitled to maintain his action and have judgment. Formerly, an impression prevailed that this motion could be made only on behalf of Plaintiff, but a contrary opinion seems to prevail now in England, and instances of motions of this description have been made on behalf of Defendant. It is certain that since the introduction of the 14 and 15 Vict., cap. 89 the courts of Lower Canada, both those of original and appellate jurisdiction, have entertained and adjudicated upon such motions, on the part of Defendant. The cases are numerous, and it is quite unnecessary to cite them here. The court has deemed it right to advert to these elementary principles, laid down in all english text books of authority, in order to show that there has been, in some respects, a deviation in our courts from the strict practice in England and the United States, in regard to motions for judg-

ment *non obstante veredicto.* This no doubt has resulted from the recent modification of our jury system General verdict were abolished by the Act of our Legislature, 14 and 15 Vict., cap. 89, and special verdicts or findings are substituted in their stead. The 5th section of that Act also confers on the Superior Court the power to set aside, on motion, verdicts and grant new trials, to arrest judgment and to set aside verdicts, with the view no doubt of entering judgment notwithstanding or contrary to the verdict; and it appears to me that the decisions as well of this court, as of the Court of Appeals, recognize a power, in the tribunal of original jurisdiction, to set aside verdicts of juries, upon mixed questions of law and fact, and upon questions of law alone and of fact alone. I think the decisions go this length. The cases are numerous but familiar to the Bar and need not be cited. Upon a careful review of these cases,, I am therefore clearly of opinion that, under our system of jury trials, the motion for judgment *non obstante veredicto,* for the reason that no evidence or no sufficient evidence has been adduced, in support of the verdict, is a proceeding sanctioned by the practice of our courts. If there can be an objection to the technical term *non obstante veredicto,* we may call it simply a motion to *set aside* the verdict, and to enter judgment for Plaintiff, or for Defendant, as the case may be, notwithstanding the finding of special facts by the jury, in other words, notwithstanding the verdict. Holding then that these motions are regular, in the particulars above adverted to, it now becomes my duty to enquire whether either of them should be granted in this case, and, if either, which of them ? Taking up first the question of evidence, we have to weigh the value of that evidence, if it appears that any has been adduced in support of Plaintiff's pretensions, as he has presented them in the present action. The Plaintiff claims £6,500 damages resulting from the breach of an alleged contract entered into by Defendants as a commercial firm, to take him into partnership. He avers that he sustained that amount of damage from having been deprived of profits and advantages and of position resulting from a partnership in the best and most extensive establishment of the kind in Canada." By their plea, Defendants, deny the existence of any such contract, and that, even if any such contract had been entered into by them (which they expressly deny), they set fort what they consider sufficient reasons to show that Plaintiff had forfeited all right to the fulfilment on their part of the pretended contract. The first question submitted by the court to the jury was in these words, and it is obvious that, upon their answer to this, Plaintiff's case mainly depended : " Did Defendants, as a commercial firm,

contract with Plaintiff to admit him as a partner in manner and form alleged in the declaration ?" To this question, the jury answered unanimously in the affirmative, and it is their finding and the evidence in support of it I have now to consider. Defendants contend that this part of the verdict is wholly unsustained by evidence; that, in point of fact, it is contrary to the testimony adduced in the cause. The first reason in support of their motion is "that no evidence was adduced, at the said trial, to prove that Defendants, as a commercial firm, did contract with Plaintiff to admit him as a partner in manner and form as alleged in Plaintiff's declaration." And their sixth reason: "That the said findings, and each and every of them, were contrary to law and to the evidence of record. The paper writing referred to in Plaintiff's declaration as embodying the contract was written by Benjamin Lyman, senior partner in the firm of Lymans, Savage & Co., Defendants, and in the form of a letter from him to Plaintiff. The terms and purport of that latter are as follows: "Montreal, 4th April, 1857. Thomas S. Higginson, Esq., Dear Sir, Touching the conversation the writer had with you, the present is to say that we will allow you £200, say two hundred pounds per annum and also five per cent. on the profits of the business carried on here for the next two years, after which time we will admit you a partner on terms that will be mutually satisfactory. This letter to be strictly private and confidential. Yours very truly, LYMANS, SAVAGE & Co." This is the written contract upon which Plaintiff relies, and I proceed now to enquire into the evidence relating to it. The testimony of Benjamin Lyman in relation to this paper, is as follows: "On the 4th April, 1857, I was senior partner of the firm of Lymans, Savage & Co. On that day, I addressed a letter to Plaintiff, on my own responsability, and, at the time, told Plaintiff so; on that occasion, I wrote the name of the firm, I told Plaintiff I only expressed my own feelings, and which might not be agreed to by the firm. He replied, he thought they would. Plaintiff had asked me what I intended to do for him, and I told him I had always intended that he should take Mr. Savage's place. Plaintiff asked me to give him in writing that I intended, and I gave him, in writing, the letter of the 4th April. This was written at the very time of his conversation with me. After the letter was written, Plaintiff remained in the employ of the firm for two years." In cross-examination he says: "The letter of the 4th April, 1857, was written in Plaintiff's room, in the store when I was taking my luncheon. I told him I had not the sanction of my partners, and he said if they did not consent it would go for nothing. Plaintiff said he thought I could induce my partners to come

into the arrangement. I had not the sanction of my partners. The first time I told my partners that I had written such a letter was after I wrote the letter of the 1st April, 1859." As a matter of fact resulting from this evidence which is precise and direct, and is uncontradicted by any other testimony of record, but, on the contrary, is corroborated by the very terms of the letter and other circumstances, it is manifest and so manifest as to leave no doubt whatever, in any reasonable mind, that this letter was written without the knowledge, sanction or authority of the other copartners, Henry Lyman and Alfred Savage. This fact being thus legally and conclusively established, the rule of law applicable is plain. The two other partners were not bound by this letter, unless they became so by subsequent ratification, this is beyond controversy, and therefore, requires no comment or citation of authority. A few legal maxims dispose of this part of the case. It is admitted that each partner is the general agent of the firm, for all purposes connected with the partnership. He may therefere dispose of the whole, or any part of the personal property belonging thereto, in like manner as if he were sole owner. So, all transactions by a partner, as agent of the firm, will bind the firm. The contract of copartnership is consequently one of the most important known to the law. Hence, it is that the express and unequivocal consent of all the other partners is required in the admission of new members. As between the partners, therefore, it cannot be created by mere operation of law, but depends solely upon the fact of agreement. No third person can be introduced by one or more partners, into a firm, but with the consent expressed or intelligibly implied from acts, unequivocal in their nature, of all the other parties. This is the law, and bearing this principle in mind, we have to enquire, whether evidence has been placed of record proving a subsequent ratification of this act of Benjamin Lyman, by the other partners, or not. If such ratification be proved, the verdict of the jury so far is good; if, however, there be no evidence whatever, or evidence to the contrary, the verdict, in this particular finding, is bad. Before proceeding further, however, in this enquiry, it is right, that the court should examine the evidence in regard to another important point in this case; and that is whether it be proved, by any kind of evidence whatever, that this offer of partnership was ever accepted by Mr. Higginson, in a way to make that acceptance known to the firm, or in any way to bind him or the firm? It will be recollected that the letter written by B. Lyman bore date the 4th April, 1857, and it is pretended that Plaintiff answered it by a letter dated the following day, that is the 5th April, 1857, this may or may not be true, the court is not

called upon to discuss moral probabilities, or to appreciate the value of conflicting presumptions, which escape the ingenuity of legal argument, but, as a matter of fact, there is no proof whatever adduced to prove that this letter of the 5th April, 1857, was ever written, was ever sent to, or received by the firm of Lymans, Savage & Co. or even Benjamin Lyman himself. A young gentleman, by the name of Spence, was examined by Plaintiff to prove that such a letter of acceptance was written, and his own words will demonstrate the value of his evidence in this particular. " Knew Plaintiff in 1857, knew of his receiving a letter from Defendants. Plaintiff brought the letter to witness, who saw a draft of the reply in 1857, shortly after he first saw the letter from Lymans, Savage & Co. Witness saw Plaintiff in the store on Sunday, and Plaintiff said there is my answer to their letter lying on the desk." This was shortly after my seeing the letter to him from Lymans, Savage & Co. CROSS-EXAMINED: " Plaintiff shewed witness the draft of his reply shortly after his receiving the original letter, cannot say how long after. The letter I speak of as having been pointed out to me by Plaintiff was pointed out on Sunday. None of the firm were present, nor any in the employ of Lymans, Savage & Co. Plaintiff had the key of the premises and was apparently in charge of them on that day. Witness did not read the letter lying on the desk, but has read the copy shewn to him by Plaintiff. It was pointed out by Plaintiff as being the letter. To the best of his knowledge it was the Sunday after the 5th April, 1857, that witness saw the letter lying on the desk that Plaintiff pointed out to him." Mr. Spence says he never read the original but has read the copy shewn to him by Plaintiff. Both parties seem to unite in speaking highly of the character and credibility of this witness; and, therefore, giving the fullest weight to his testimony, I am bound to say that there is no positive or legal evidence whatever of the existence of this letter of acceptance. The most that can be said is, that there exists a presumption that such a letter was written, as Mr. Spence's evidence seems to imply. But this presumption is refuted by the testimony of Mr. Clare, bookkeeper of the firm, and of Benjamin Lyman. Mr. Clare says: " As bookkeeper witness had access to all books and letters to or from and of the firm. Was constantly in the office. Witness never heard of the letter of date the 5th April, 1857. Never saw it. Only heard of it a few days since. Had such a letter been left lying on the office desk, witness would certainly have seen it. He thinks he would have seen it, if left lying as Mr. Spence says. It is his business to put away papers. As they accumulate they are filed away." Mr. Benjamin Lyman says:

"I did not receive any letter from Plaintiff of date the 5th April, 1857. I did not see such a letter lying on the office desk. The firm did not, to my knowledge, receive such a letter, I never read such a letter or saw it, nor heard of it till a day or two ago, when my lawyers shewed me a copy of it." The letter here referred to, and of which an alleged copy is produced, is in these words: "Montreal, 5th April, 1857. Messrs. Lymans, Savage & Co., Montreal: " DEAR SIRS, In reply to yours of the 4th inst., the present is to say that I accept your offer of two hundred pounds per annum, and five per cent., on the profits of your business for two years from this date, after which time you are to admit me a partner, upon terms mutually satisfactory. " Yours truly, T. S. HIGGINSON. " P.-S. — My name of course to appear in the firm." Had proof been offerred that this letter had been written on the day it bears date, or about that time, and that the firm had then received it, such a formal acceptance, it must be conceded, would have had a very serious significance in the present case, but, as a matter of fact, the court does not find in the evidence adduced any proof that such a letter was ever written at the time it purports to bear date, or at any time during the two years, or that it was sent to, or received by the firm of Lymans, Savage and Co., or Benjamin Lyman, and we look in vain for any other testimony to shew that Plaintiff formally or expressly accepted the proposed offer of Benjamin Lyman to become a partner in the firm, before the expiration of the two years. It is quite true that he remained in Defendants' employ, received the £200 per annum, and 5 per cent. upon the profits. It results clearly from these facts that so far, he did accept the offer, and it may be urged, with some appearance of truth, that the acceptance and compliance with part, was, or was equivalent in fact to an acceptance of the whole. The jury, no doubt, thought so, and that, so far as it was a contract, it was completed and rendered binding upon both parties, and the court is of opinion that, in so far as the acts of Higginson tend to prove an acceptance of the whole contract by him, the proof of these acts was evidence to go to the Jury and that it was their duty to appreciate that testimony. It would be going too far, therefore, to say that there is no proof of the acceptance by M. Higginson of Benjamin Lyman's offer of copartnership. Assuming however, that there was the tacit acceptance contended for, it could only be such, in regard to Benjamin Lyman, unless it be proved that the other partners were aware of the letter of the 4th of April, 1857, written by their partner Benjamin Lyman and of the offer of 5 per cent. on profits and of the prospective partnership therein contained. It was urged, in argument, by Higginson's counsel, that we must

infer or presume the other partners' knowledge of the offer of partnership and of the 5 per cent. profits from the fact that Plaintiff's salary was raised to £200 per annum after the 4th April, 1857, and that he remained in their employ during two years. Now the court is of opinion that, even in the absence of all evidence to the contrary, we could presume no such thing. No legal presumption or inference of fact could arise here, and for this simple reason : The engagement of M. Higginson, by the senior partner, for two years, at £200 per annum, bound the firm, their acquiescence was not necessary, they, as a firm, were bound in law to fulfil that engagement. If this part of the contract required their ratification, and they had ratified it by paying him £200 a year, a presumption might arise that they had ratified the entire engagement. There is an obvious distinction here, and one we must not lose sight of. The court must, as a matter of law, regard this engagement to pay 5 per cent. on the profits, and the offer of a partnership separately from the hiring of Plaintiff for two years at £200 per annum, and suppose, as we must, in examining the force of presumptions, and the applicability of evidence, that Benjamin Lyman had offered, without the sanction of the firm, 5 per cent. on profits and a partnership alone, would complete silence and inaction, upon that engagement, raise a presumption in law or in fact that the other partners had ratified the engagement ? Assuredly not. And the court is of opinion that this is undoubted law, even if they were aware of such an agreement having been entered into by their partner. Silence and inaction, during the period to the time when the contract was to take effect, is not, in a case like the present, a ratification of the contract ; and no presumption of acquiescence is legally deducible from such silence and inaction, even if they were aware of the existence of such an engagement. But, let us enquire a little further into this matter and examine the evidence touching their knowledge or ignorance of Benjamin Lyman's letter of the 4th April, 1857. And first, as to the 5 per cent., respecting which a good deal has been said. This credit of 5 per cent. to Plaintiff was never entered in the books. Clare the bookkeeper says he became aware of it only in May, 1859. The charge was made in the books of the firm in 1860, and was then charged to Benjamin Lyman, because the other members of the firm objected to it. Benjamin Lyman says ; " The first entry made in the books of the firm, with reference to the 5 per cent., was made in 1860. His partners knew nothing of it till about the time that Plaintiff demanded to be admitted into partnership and was refused. The firm was sued afterwards for the 5 per cent. After suit, I and Clare made up the amount to the best of our ability, and

we decided that if the amount was not accepted, Plaintiff might go on with his suit. The amount $1,200 was accepted by Plaintiff and was charged to me individually, on the ground that I had promised it to Plaintiff, without my partners' consent, and that they were not responsible." It will be remarked that the payment of 5 per cent. was made by Benjamin Lyman himself, on the 18th May, 1860, after the action was brought and appeared then for the first time in Defendants' books and to the debit of B. Lyman. That his partners were ignorant of his engagement to pay the 5 per cent. till then, and they then disavowed his act. This testimony, corroborated as it is by Clare and by all the circumstances relative to this charge of 5 per cent. as proved, is, in the opinion of the court, conclusive: unless, indeed, we discard the whole statement as a tissue of falsehood from beginning to end, which nothing in the character of the witness, or on the record will justify. Then as to the partnership. Clare never heard of it. Higginson never spoke to him of it, and B. Lyman swears that his partners knew nothing of the letter of the 4th April, 1859, and, when he made demand of a partnership, he is met by a peremptory refusal on the part of the firm, and yet, in the face of all this, the jury found they had ratified the engagement entered into by B. Lyman. The court has no hesitation in saying that such a finding is not only without evidence, but contrary to evidence. That the verdict in this particular is bad, and that all the findings must be set aside. I have felt it my duty to dwell at length upon this part of the case, because the jury who rendered this verdict was composed of men of high character and great intelligence, and, in deciding, as I feel bound to decide, that their finding is contrary to evidence, it is proper that the parties immediately interested in this cause should be made fully aware of the grounds upon which this judgment of reversal rests. The court is confirmed in the view here taken inasmuch as it is sanctioned by the charge of the honorable and learned judge who tried this cause, and I entirely concur in the opinion he expressed in his charge to the jury that, had a non-suit been asked for by Defendants, he would have granted such an application. The first finding of the jury being thus disposed of, it is obvious that the remaining seven findings share the same fate, they can offer no obstacle to the setting aside of the verdict *in toto*, but it is proper that the court should offer some observations respecting the last finding of the jury assessing the damages, and, in doing so, it is necessary to advert, not only to the evidence, but also to the allegations of Plaintiff's declaration. The contract is thus set out: " And, whereas, heretofore, to wit, on or about the 4th day of April, 1857, at the city of Montreal, by

a certain writing, *sous seing privé*, written on behalf of Defendants, by Benjamin Lyman, the senior partner of the firm of Lymans, Savage & Co., Defendants undertook and declared that they would allow Plaintiff £200 per annum, and also five per cent. on the profits of the business carried on there, to wit, in the said city of Montreal, for the next two years, to wit, after the date of the writing, after which time, they agreed to admit Plaintiff as a partner into the business of Defendants." There is a strange allegation following, that the connection was intended to be permanent and coutinuous. Apart from this avowment of perpetuity in the copartnership we have not a word about the terms and conditions of the proposed association, and, on looking at the paper writing of which *profert* is here made, we find that, not only were no terms whatever agreed upon or mentioned, but that they were to be subsequently determined upon to the mutual satisfaction of both parties. The allegations of the declaration leave us completely in the dark upon this essential point, and the letter but increases the obscurity except in this that it demonstrates that the terms of the connection were to be the subject of future negotiation, and that, as a matter of fact, the conditions were expressly left unsettled, they were reserved by the very terms of the letter for future adjustment, and were to be arranged so as to be mutually satisfactory. Now, what is the present action brought for? For the recovery of damages resulting from the breach of this alleged contract. And what are the damages claimed? For loss of prospective profits only. In order that there may be no misapprehension upon this important point, I will quote the very words of the declaration: "And Plaintiff avers that by the refusal of Defendants to admit him, as such partner, he had been deprived of profits and advantages and of position resulting from being thereby established in the best and most extensive establishment of the kind in Canada, and has suffered injury and damage in all to the amount of £6,500 and upwards." It is quite true that, in a previous part of his declaration, he says "that, relying on this agreement, he refused other advantageous offers," but he does not assign these refusals as causes of damage, nor does he claim indemnity for such lost opportunities of improving his fortunes, but exclusively and expressly for loss of future prospective profits in the firm of Lymans, Savage & Co., and for this alone. Now let us enquire into the nature of these damages and consider the possibility of adjusting them under these allegations. It is perhaps unnecessary to say that, in a case like the present, there can be neither nominal nor vindictive damages. The loss must be determined by the plain process of figures, and the damages fixed with

something approaching to arithmetical accuracy; they may amount to more or less, according to the judgment of the jury, but there must be a basis upon which the award is to rest, and a calculation susceptible of some kind of analysis. Now, neither under under the allegations of Plaintiff's declaration, nor upon the evidence adduced, had the jury any such basis nor had they any means of making such a calculation of the damages claimed. It is not alleged, nor is it proved (in fact it could not be proved) whether it was money or labour and skill Plaintiff was to contribute. No amount is mentioned or proved, nor any mention of skill and labour as his contribution. It is not alleged, nor is it proved, what share of profits he lost. Now, holding as we must, with this declaration before us, that loss of profits alone are claimed, how did or how could the jury award £1250? To what share of the profits was this sum equivalent? With this statement of his case, and this proof in support of it, how could the jury find that he lost £1250, when he omits to tell them the proportion of the profits he was to receive? In this particular, both the allegations of the declaration and the evidence are fatally defective. Whether the loss of profits be accrued or prospective, the same insuperable difficulty presents itself. The action is so brought and the evidence is of such a character, that no legal, no intelligible adjudication of damages could, or in the opinion of this court, can ever take place in this cause. In a case not only analogous but similar to this, Chief Justice Abbott, afterwards Lord Tenterden, gave his opinion in the following terms: "He was of opinion that the action was not maintainable, in the absence of evidence to shew the terms upon which the parties were to become partners, and said that he had never heard any instance in which such an action had been supported without proof of the terms." This was the case of *Figes* vs. *Cutler*, and has not, as I am aware, been overruled. The case in 9. Bingham, cited by Plaintiff's counsel, is entirely different from the present. This, as it appears to me, is not only sound law, but from pure necessity and the plainest dictates of common sense is entirely conclusive. For all these reasons combined, and in view, both of the pleadings and the evidence adduced, the court is of opinion that the motion to set aside the findings of the jury, and to dismiss the action must be granted, and the action is dismissed accordingly.

JUDGMENT: "The court, having heard the parties by their counsel, upon Defendant's motion of the 20th inst.: That the verdict and finding of the jury rendered and made on the 14th day of November inst., at the trial of the issues in this cause, be set aside and be disregarded, and, thereupon,

notwithstanding said verdict and findings, that the declaration and action of Plaintiff be hence dismissed; having examined the proceedings, evidence and record, the verdict and findings of the Jury, and upon the whole deliberated; considering that it appears, both by the parole testimony adduced by Plaintiff at the trial, and also by the paper writing by him produced, purporting to be a letter written and signed by the firm Lymans, Savage & Co., the Defendants, but proved to have been written and signed without their authority or knowledge and addressed to Plaintiff that no legal or binding contract was thereby entered into between Plaintiff and Defendants as a commercial firm or otherwise; considering that there is no evidence whatever of any contract between Plaintiff and Defendants to admit Plaintiff into partnership; considering that Plaintiff's action is brought to recover of, and from Defendants damages resulting from the breach of the alleged contract or offer to admit Plaintiff into partnership, stated to have been entered into between Plaintiff and B. Lyman acting therein for Defendants, and also one of Defendants in this cause, by letter dated 4th April, 1857, and seeing that the damages thus alleged and claimed by Plaintiff's action, and by him declared to have resulted from the loss of future profits in the firm of Lymans, Savage & Co., and exclusively for damages so resulting to Plaintiff; considering that it doth not appear, by the allegations of Plaintiff's declaration, nor by the evidence adduced, what were or were not to be the terms and conditions of the proposal copartnership, alleged to have been agreed upon between Plaintiff and Defendants; considering that it doth not appear, by the allegations of Plaintiff's declaration, nor by the evidence adduced what sum or amount plaintiff was to bring into the capital, stocks, or copartnership of Lymans, Savage & Co., or what he was to contribute thereto as a partner; considering, further, that it does not appear by the allegations of Plaintiff's declaration, nor by the evidence adduced, what was to be Plaintiff's share or proportion of, and in the future profits of, the said firm and copartnership of Lymans, Savage & Co., considering that, without the allegation and proof of what Plaintiff's share and proportion in such profits were to be, no action such as the present could or can be maintained in law; nor could any legal verdict be rendered therein, awarding damages, such as are claimed in this cause, to Plaintiff; seeing, therefore, that the 1st and the 8th findings are, and each of them, is contrary to law and to the evidence adduced, and, considering that the 2nd, 3rd, 4th, 5th, 6th and 7th findings of the verdict are entirely void, null, inoperative and of no effect in law, and must be overruled, set aside and rejected,

doth grant the motion of Defendants, and, in consequence, the verdict and findings are and each of them is hereby set aside, and Plaintiff's action is hence dismissed. (4 *J.*, p. 329.)

CROSS and BANCROFT for Plaintiff.
F. G. JOHNSON, Q. C., Counsel.
ABBOTT and DORMAN, for Defendants.
BETHUNE, COUNSEL.

PROCES PAR JURY.—DEFINITION DES FAITS.

QUEEN'S BENCH, APPEAL SIDE, 7th September, 1860.

Coram Sir L. H. LAFONTAINE, Baronet, Chief-Justice.
AYLWIN, DUVAL and MONDELET, Justices.

LYMAN *et al.*, Appellants, and HIGGINSON, Respondent.

Dans une action en dommages, contre les Défendeurs, pour refus de se conformer à leur engagement de recevoir le Demandeur comme membre de leur société, les Défendeurs plaidèrent la conduite immorale du Demandeur, qu'il avait constamment cohabité avec une femme dissolue, et avait introduit des femmes prostituées dans les appartements garnis des Défendeurs, qu'il s'était absenté la nuit de ces appartements qui étaient confiés à ses soins comme employé des Défendeurs, et qu'il avait fréquenté des mauvais lieux, et s'était conduit d'une manière irrégulière, inconvenante et immorale.

Jugé: Qu'en soumettant les faits à la considération des jurés, des questions relativement à ces actes d'immoralité eussent dû être soumises comme nécessaires à la défense, et des questions aussi soumises quant à la conduite immorale et irrégulière du Demandeur. (1)

The appeal was from an interlocutory order of the 31st October, 1859, rendered in the Superior Court, Montreal, defining the facts to be submitted to a jury. The Respondent, Plaintiff below, set up, in his declaration, allegations which were substantially to the following effect: That Defendants had been in trade, at Montreal, under the firm of Lymans, Savage and Co., as copartners, dealers in drugs, paints, dye stuffs, &c; that Plaintiff had been, for upwards of seven years, in the employ of Defendants, and that " heretofore, to wit, at " the city of Montreal, by a certain writing *sous seing privé*, " written on behalf of Defendants by Benjamin Lyman, the " senior partner of the firm, and signed in the name of the " firm of Lymans, Savage and Co., Defendants undertook and " declared that they would allow Plaintiff two hundred pounds " per annum, and also, five per cent. on the profits of the " business carried on there, in the city of Montreal, for the " next two years, after the date of the said writing, " after the expiry of said two years, which expired on

(1) V. art. 352 C. P. C.

" the fourth day of April last past, they agreed to admit " Plaintiff as a partner in the business of Defendants ; " that Plaintiff's knowledge of the business of Defendants, and his business capacity to manage the same were of great use to Defendants, and formed one of the inducements to them to agree to his admission as a partner ; that relying upon said agreement he refused other advantageous offers made to him, and continued faithfully to perform his duties in the establishment of Defendants, and did, in all things, conform to his duty ; Plaintiff alleged also the refusal of Defendants to admit him as a partner ; " and that the " value to Plaintiff of being so admitted as a partner in " the business of Defendant exceeded £6500," and that, by the refusal of Defendants to admit him as such partner, he had been deprived of profits, and of advantages, and of position, and had suffered injury and damage in all to the amount of £6,500, and upwards. Conclusions for £6,500, and costs of suit against Defendants jointly and severally. The Defendants pleaded that the terms of the paper writing did not constitute any final agreement on the part of Defenfants to receive Plaintiff as partner, upon terms then agreed upon or understood, but expressed the individual intention of Benjamin Lyman himself, of which intention the other Defendants had no knowledge, and in which they did no participate, and that in fact, Defendants, as copartners, never contracted or agreed with Plaintiff in manner and form as set forth ; that the intention of receiving Plaintiff into partnership was only conditioned upon the continued good conduct of Plaintiff, and that, even had they all concurred, as copartners with Benjamin Lyman, in the expression of such an intention, and in the signing of said letter, which they expressly denied, they could not be called upon or required to carry out such intention, inasmuch as, between the fourth of April, 1857, and the fourth day of April, 1859, and especially during the year 1858, and from that year up to the fourth of April last past, Plaintiff had conducted himself in an irregular, immoral and discreditable manner, and especially they averred that, during the whole or the greater part of said time, Plaintiff had in his keeping in Montreal, and constantly cohabitated with a woman of profligate character, whom he maintained and supported at a great expense in a state of prostitution ; and that, contrary to his duty, and to all the obligations of morality and decency, Plaintiff introduced prostitutes, at various periods, not only in the night, but also during the sabbath day, into apartments fitted up in Defendants' shop and premises, and also that, at other times, when he should have remained in the premises, which were under his charge, he

habitually and constantly passed his nights at brothels and other disreputable places, and comported and conducted himself in a disobedient, irregular, improper and immoral manner, and in a manner discreditable to himself and injurious to the firm, and to its respectability and credit; that Plaintiff was therefore notified by B. Lyman that the letter or agreement could not be carried out. The answer to the plea was to the effect that all the allegations were untrue, and were made use of for the purpose of evading the execution of the agreement referred to. Suggestions as to the facts to be found by the jury were sent up by Plaintiff and Defendants, and, on the 31st October, 1859, the court, MONK, Justice, appointed a day for the trial and defined the following facts for the jury: 1. Did Defendants, or did any one (and which) of them, execute the paper writing *sous seing privé* of date the 4th of April, 1857? Let it be specially found by which of Defendants, and when said paper writing was so executed. 2. Did Defendants refuse to admit Plaintiff as a partner in their firm? 3. Did Defendants tortiously and wronfully refuse to admit Plaintiff as a partner in their firm? 4. Did Plaintiff suffer any and what amount of damage by the failure or refusal of Defendants to carry into effect the said agreement, through Defendants' failing or refusing to admit Plaintiff as a partner in the firm of Defendants? 6. Do you find for Plaintiff or for Defendants, and if for Plaintiff, for what sum? The Defendants filed an exception to this judgment, and, on the 2nd of November, 1859, served upon Respondent's attorneys notice that, on the 1st of December, they would move for leave to appeal from said judgment.

On the 17th November, 1859, Plaintiff again moved for the fixing for the trial, and in respect of the defining of the facts made the following motion. "With a view to obviate delays and save costs, Plaintiff prays *acte* of the declaration he now makes, that he is willing, but, without admitting their relevancy or sufficiency in any respect, that the 4th and 5th suggestions of Defendants be adopted and submitted to the jury, so that the finding of the jury thereon may serve and avail as to law and justice may appertain, saving the recourse of the parties as to the relevancy, sufficiency or legal effect of such findings, and Plaintiff, consequently, moves for the adoption of said 4th and 5th suggestions." By judgment of the 25th November, *acte* was granted as prayed for, and the trial fixed for the 14th December; on the facts as defined by the judgment of the court. On the 30th November, after notice, Plaintiff prayed *acte* "of the declaration he now makes that he desists from the judgment of the 31st October last past, in so far as said judgment omits to adopt the fourth and fifth suggestions

of Defendant consenting hereby that the said 4th and 5th suggestions be adopted to serve as to law and justice may appertain." These suggestions were as follows :

Fourth. Did the Plaintiff, between the 4th day of April, 1857, and the 4th day of April, 1859, while a clerk in the Defendant's employ, conduct himself in an irregular, immoral and discreditable manner? *Fifth.* Were the habits and conduct of the Plaintiff, between the 4th day of April, 1857, and the 4th day of April, 1859, or during any part of that time, contrary to the obligations of morality, and calculated to affect injuriously his reputation, credit and character?

On the 6th December, the writ of appeal moved for by Defendants .was served on Respondent who, on the following day, presented a petition praying the court "to set aside, so far as need be, the judgment defining the facts in this cause, and proceed *de novo* to define the facts to be submitted to the jury, and adopt for the purpose the suggestion of Defendants." This petition was rejected. In appeal it was urged on behalf of Appellants, that the facts as defined were imperfect and incomplete, and did not cover the material issues. That the *désistement* as made was of no avail, and that after service of the writ of appeal a judge in vacation could not, nor could the court in term alter the judgment or define the facts *de novo.* The Respondent contended that the appeal was entirely unnecessary and should be dismissed; that it was no legal answer to an action on a contract that Plaintiff had been immoral; and that, if such fact could influence the quantum of damage, the immorality might be proved at the trial, and the finding of it was unnecessary.

JUDGMENT : Seeing that the court below, in defining the facts to be found by the jury, ordered to try the issues joined between the parties, omitted to have regard to the allegations of Defendants in their perpetual exception contained, and that, therefore, the definition is imperfect and incomplete, and that, therefore, in the judgment of the court below, there is error, it is considered and adjudged that the judgment rendered in the Superior Court, at Montreal, on the 30th day of October last, be and the same is hereby reversed, and proceeding to render the judgment which the court below ought to have rendered, it is, further, considered and ordered that the record be remitted to the court below, and that the questions following be propounded to the jury, and that answers be taken to the same articulately, to wit: 1. Did Defendants, as a commercial firm, contract with Plaintiff, to admit him as a partner in manner anh form alleged in the declaration? 2. Have Defendants refused to admit Plaintiff as such partner? 3. Did Plaintiff, between the 4th of April, 1857, and the 4th

of April, 1859, cohabit openly with a woman of profligate character, and did he maintain her in a state of prostitution ? 4. Was Plaintiff, bound to remain upon the premises in charge during the night time ? 5. Did Plaintiff, during the said period of time, absent himself from Defendant's store at night, in order to pass his time at brothels ? 6. Did he introduce women of bad fame into the said store, within the said period ? 7. What is Plaintiff's general character, and is he a person of irregular, immoral and discreditable conversation and repute ? 8. Did Plaintiff suffer any damage by reason of not being admitted into the said firm as a partner, if so, at what sum do you assess the damages ?

That thereupon such further proceeding be had in the court below as to law and justice may appertain in the premises. (10 *D. T. B. C.*, p. 392.)

ABBOTT and DORMAN, for Appellants,
CROSS and BANCROFT, for Respondent.

COMMISSAIRES D'ECOLE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 1st December, 1860.

Before Sir L. H. LAFONTAINE, Bart., Chief Justice, AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

ADAMS, Apppellant, and THE SCHOOL COMMISSIONERS FOR THE MUNICIPALITY OF BARNSTON, Respondents.

Dans une action portée pour recouvrer £62.10, "balance due pour la construction d'une maison d'école modèle," en vertu d'une obligation des commissaires d'école, en faveur du Demandeur, et un autre, son cédant, les Défendeurs plaidèrent qu'ils avaient prélevé £150, au moyen d'une cotisation, et qu'ils avaient reçu £150, du fonds des écoles, faisant en tout £300, qui avaient été payés au Demandeur, et que les commissaires ne pouvaient, soit prélever, ou dépenser une plus forte somme et que l'obligation était nulle et de nul effet.

La clause du Statut (9 Vict. ch. 27, sec. 21, sous-sec. 3) qui définit les devoirs et les pouvoirs des commissaires d'école en autant qu'il s'agit de la construction et réparation de maisons d'école, etc., contient ce *proviso :* "Pourvu toujours qu'il ne sera prélevé aucune taxe pour la construction d'une école modèle ou supérieure excédant £150."

Jugé : Que l'obligation excédait la somme de £150, pour laquelle seule la municipalité pouvait être cotisée et condamnée à payer, et était de nul effet quant aux Défendeurs. (1)

The action in the court below was brought in the Superior Court, at Sherbrooke, under an obligation ol the 5th July, 1852, by the commissioners, in favor of Appellant, and one Humphrey, who ceded his rights to Appellant, "for £62 10, "the balance due for the building of the model school-house

(1). V. art. 2053 S. R. Q. et 358 C. C.

" at Barnston corner." The Defendants pleaded the general issue, also a plea setting up, in effect, that the then commissioners had raised, by assessement, £150 for building the school-house, and had received a like sum from the common school fund, making in all £300, which had been expended upon the school house; that the commissioners were, by law, precluded from levying or expending any further sum for that purpose, and that the obligation for the £62 10 was, therefore null and inoperative to bind Defendants. The 9 Vict., cap. 27, sect. 21, details the duties of the school commissioners, as to building and repairing school-houses, and contains this provision: "Provided that no rate shall be levied for the building " of a superior or model school to exceed the some of one hun- " dred and fifty pounds." On the 19 September, 1859, the court, (SHORT, Justice), rendered judgment: "Considering " that the obligation was for the payment of a model school " house, and was in excess of £150, for which sum only the " municipality could legally be assessed and condemned to " pay, and that the same was and is inoperative to bind Defen- " dants, the court doth maintain the exception etc."

MONDELET, J., held that the expenditure over the sum limited by the statute was illegal, the admission of the debt was also illegal, and that the judgment must be sustained.

AYLWIN, J., said that there was a fatal defect in the form of the action. It purported to proceed upon a bond signed by four parties with four seals. Such an instrument could not bind the corporation. It goes on to hypothecate the school-house lot, this could not be, it was an alienation which these parties could not make. The statute as construed by Appellant was of no avail. The commissioners would have a discretion to build an ivory palace and make the public pay for it. He approved the judgment of the court below.

MEREDITH, J., referred to a passage in the Appellant's factum which is as follows: " The principle recognized by this " judgment is, that the obligations of municipal corporations, " under contract, in matters under their control, are mea- " sured by their powers." This is a bold proposition. In his opinion, this principle was not only that recognized by the judgment appealed from, but the basis upon which it rests was incontrovertible. A corporation can no more enter into a contract beyond its powers than if it had no existence, indeed with respect to such contracts, the corporation may be said to have no existence. The real question was as to whether Respondents had power to make the contract. The general rule is that: " a corporation has no other powers " than such as are specifically granted, or such as are necessary " for the purpose of carrying into effect the powers expressly

"granted." (1) The powers of the school commissioners are defined by statute, and there is an express provision, that "noo rate shall be levied for the building of a superior or "model school to exceed the sum of £150." The object of the legislature was to prevent school commissioners from subjecting a municipality to a liability for a greater sum than £150, and as, according to law, they could not do so directly, by the levying of a rate, neither ought they to be permitted to do so indirectly by the contracting of a debt. If the pretensions of Appellant were well founded, the manifest intention of the legislature, could easily be defeated. The commissioners could contract any debt they liked for the building of a school, the creditors would recover, judgment could be enforced, in the ordinary course of law, or by an assesment to be levied under 10th sec. of the 19 Vict., cap. 13. It has been urged that the commissioners may have extraordinary funds to meet an excess of expenditure, but there is no proof of this being the case. So it was urged, that according to the principle maintained by the court below, a teacher could not enforce his contract for wages, nor a man who contracted to furnish wood, unless special power were contained in the law, for levying for such purpose, and then only for the amount specified in the law. The power to engage school masters and school mistresses is one of the powers expressly given to the commissioners by the statute, and the power to purchase firewood is a power necessary for the purpose of carrying into effect the power expressly granted. The law does not put any limit upon the exercise of these powers; and, therefore, a contract entered into in good faith by the commissioners for either of the purposes just mentioned would be valid, and could be enforced by action, but the law has virtually put a limit on the amount to be levied from the public for the purpose of building school-houses; and a contract the direct tendency of which appears to be to defeat the avowed intention of the legislature, ought not to be enforced in a court of law. Judgment confirmed. (11 *D. T. B. C.*, p. 46, et 4 *J.*, p. 363.)

SANBORN and BROOKS, for Appellant.

RITCHIE and BOCLASE, for Respondents.

(1) Angel and Ames, *on Corporations*, pp. 66, 192, 200.

VOITURIER.—PATRON DE VAISSEAU.—RESPONSABILITE.

QUEEN'S BENCH, APPEAL SIDE,
Montreal, 1st September, 1862.

Before Sir L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, J.

GAHERBY, Appellant, *and* TORRANCE et al., Respondents.

Jugé: 1° Que le patron d'un vaisseau est responsable des dommages survenus aux effets transportés sur le pont.

2° Que, pour le recouvrement de la différence entre la valeur de la marchandise saine et le prix réalisé après l'avarie, il n'est pas nécessaire que le consignataire donne au patron avis de la vente publique qui en devait être faite; le patron n'alléguant pas qu'il avait souffert de l'absence de tel avis.

The action was instituted by Appellant against Respondents, on the 7th January, 1859, claiming from them £87 17s. 1d., with interest and costs, as a balance alleged to be due to Appellant, for freight and port or canal charges, on 4070 bags of salt, agreed to be carried by Appellant from Quebec to Montreal for Respondents The declaration alleged that, on the 14th day of May, 1857, Gibb and Ross, of Quebec, shipped on board of the barge *New Liverpool*, belonging to Appellant 4070 bags of salt to be delivered, at Montreal, to Respondents, they paying freight at the rate of 5½ pence per bag therefor. The salt to be delivered in good order and condition, save and except the act of God, the Queen's enemies, and all and every the accidents of the sea and navigation of whatsoever kind. A special agreement to carry the salt partly on deck, in conformity with a custom to that effect, was set up, and an allegation that, during the voyage, the vessel with her cargo suffered considerable damage from the perils of navigation, against which the master entered his protest; that 4070 bags were delivered to Respondents, of which 300 were damaged, but that the damage was caused by accidents specially excepted under the contract. £10 was paid on account of the freight to the captain, and the action claimed the balance. The Respondents met the action with a special plea, a *défense au fonds en fait*, and an incidental *demande*. The bill of lading was set forth, which was in the usual terms, and Respondents represented that Appellant had, in breach of his contract, so carelessly and negligently conducted himself that 283 bags of salt, of the value of £70 15s. 0d., were wholly lost, and 617 bags were so much damaged by water, that after a survey and examination to prevent their becoming a total loss, the same were sold at auction and realized only £42 10s. 0d., the same if in a sound condition being then worth £154 5s. 0d., so that there was a loss on

these 617 bags of £109 5s. 0d., owing to the negligence of Appellant. The Respondents, moreover, denied that there was any special agreement to carry the salt on deck, or that there was any custom to sanction such a proceeding, and alleged that Appellant had carried part of the same on deck, contrary to his duty, and that the loss was owing to his negligent conduct and violation of his contract, and prayed that compensation should be declared to have taken place. By their incidental *demande*, Respondents set up the damage sustained by the loss of the 283 bags, amounting to the sum of £70 15s. 0d., and the loss on the 617 damaged bags,, £109 5s. 0d., together £180 0s. 0d., and alleging that the loss was caused by the negligence of Appellant and the violation of his duty, asked for a condemnation against him for that sum. On the part of Appellant, one McDougall was examined, with whom, as the agent of Gibb and Ross, the special agreement to carry part of the salt on deck was pretended to have been made by Appellant, but he proved an agreement merely to carry, " according to the bill of lading," and stated further " that, from his experience of the last sixteen years, if there had been any salt on deck, it should have been mentioned in the bill of lading." Another witness, François Carrière; was examined to prove that it was customary " to fill the hold of barges, and then put the rest on deck." He had been master of the *New Liverpool* : " She could only carry 3450 bags in the hold," so that on the voyage in question there must have been 550 bags on deck, at least. The captain McGregor was also examined, who stated " that there was a small portion of the salt on deck, but it was hardly damaged at all," and that the vessel leaked, in consequence of the bad weather, and that there were from 3 to 3½ feet of water in her hold, and that the whole of the damage to the cargo on that voyage was from stress of weather, and was almost confined to the lower tiers of salt in the hold. In contradiction of this statement however, the captain, in his protest, declared that he encountered two violent gales, and was twice cast adrift by the steamer which was towing him, and that the barge shipped large quantities of water over all, the bulwarks being under water. The Respondents proved, by the warehouse-keeper who received it, the short delivery of the salt, and the damage to the 617 bags, and the necessity to sell it to avoid a total loss. Millar, a clerk of Respondents, proved that the salt first delivered out of the barge was damaged, and that the salt subsequently landed was not damaged, except a small quantity in the lower tier of the cargo, and that not more than is usual. McLennan had been for 11 years engaged in the salt trade. He proved that salt carried on deck between Montreal and Quebec, was more

exposed to danger from rain or water from the river than when under deck, and that the barges were generally heavily laden. The following is the judgment of the Superior Court:

"The court, considering that Plaintiff hath not established the averments of his declaration, to wit, among others, the custom of trade, and the consent by Plaintiff alleged to have been given by Defendants to the carriage of the salt on the deck of his schooner, *New Liverpool*, from Quebec to Montreal; and that the loss incurred upon the salt shipped by him at Quedec, on board of the schooner for delivery to Defendants was caused by the act of God, and the perils of navigation; and considering that it is established that the damage incurred to Defendants, by the short delivery to them, and by the loss suffered by them, by reason of said salt, amounts to a sum of £137 6s. 5d., exceeding the sum of £87 17s. 0d., the balance of the freight and charges of the salt so shipped by Plaintiff, and by him demanded, to wit, exceeding said balance by the sum of £49 9s. 5d. and which total amount of damage, so exceeding said balance, Defendants have, by their plea, set off and compensated, and claimed to set off and compensate, against Plaintiff's demand, and considering that Defendants and incidental Plaintiffs have, by their incidental demand, demanded to be paid by Plaintiff and incidental Defendant the said sum of £49 9s. 5d., and have established their right thereto, the court doth dismiss Plaintiff's action, and doth maintain the incidental demand, and doth condemn Plaintiff and incidental Defendant to pay and satisfy to Defendants and incidental Plaintiffs, the sum of £49 9s. 5d. with interest, etc.

DUNLOP, for Appellant: The Appellant relies on the following reasons why the judgment appealed from should be reversed: *First*, There was a special permission given to and agreement made with the owner of the barge during that voyage, that a portion of her cargo of salt might be taken on deck; *Second*, It is proved that it is also the custom of the trade, for barges such as the *New-Liverpool*, to take portions of cargo on deck, between Quebec and Montreal; *Third*, There is sufficient evidence to show that all the damages sustained by the cargo, during the voyage, were caused by the dangers of navigation, which were especially excepted in the bill of lading; *Fourth*, There is no evidence at all that any damage was sustained by that portion of cargo which was carried on deck; *Fifth*, There is no evidence to show that any quantity of the cargo was actually carried on deck; *Sixth*, The liability of a carrier to deliver the goods intrusted to him in good order, or to account for the damage, in such a way as to exonerate him from his liability, ceases on the delivery to the consignee; and, in this case, Respondents accepted the cargo

without a word of objection, without survey, or protest, and it is not proved that the sale which is alleged to have taken place, a week or ten days after the delivery of the cargo, was with the knowledge of Appellant or for his account and risk.

MORRIS, for Respondents: The Respondents contend that the judgment of the Superior Court ought to be upheld for the following reasons: 1st. Because there is no evidence to show that the damage sustained was occasioned by any cause covered by the exceptions contained in the bill of lading. The *onus probandi* was upon the carrier to establish this, (1) and, having failed to do so, he must be held for the damage; 2nd. Because a portion of the cargo was carried on deck, contrary to the terms of the bill of lading, which imported that the goods were to be carried under deck, and salt ought so to be carried. (2) Moreover, the deck portion of the cargo, having, according to the protest of the captain, been exposed, to waves washing over the vessel the presumption is that the damage arose from the exposure of the deck load, a presumption which is corroborated by the testimony of Millar, as to the condition of the cargo when being delivered; 3rd. Because no special agreement, apart from the bill of lading, to carry on deck has been proved, but the reverse, and, even if there were, parol evidence to explain the bill of lading as a contract is inadmissible; (3) 4th. Because no custom to carry on deck has been proved; 5th. Because the loss arose from carelessness and negligence on the part of Appellant and his servant, the captain, whose conduct during the delivery of the salt is suggestive of the probable cause of the damage; 6th. Because the accounts given by the captain of the cause of the damage are irreconciliable and contradictory. According to the protest, the damage arose from waves washing over the barge, but, according to his testimony, it was from leakage, so much so, that there were, he pretends, 3 to 3½ feet of water in the hold, while, strange to say, only the lower tiers of a cargo so solnble as salt were, as he asserts, damaged.

AYLWIN, Justice, dissenting: It is established that the barge met with very bad weather during that voyage upwards from Quebec, that the vessel leaked in consequence of the bad weather, and that there were 3 to 3½ feet of water, in her hold; that the whole of the damage to the cargo was from stress of weather, and was almost confined to the lower tiers of salt in the hold. Upon the arrival of the barge, the

(1) Flanders, on *Shipping*, 262, 291.

(2) Abbott, 526; Valin, *Com. ord. mar.*, 620, 621; Flanders, 209, 210.

(3) Flanders, 454.

usual precaution was taken to enter and extend her protest before Isaacson and colleague, notaries. It has been urged that the damage which was occasioned to the salt, arose in consequence of there being a deck load used in its conveyance; and that, therefore, there was carelessness and negligence on the part of the shipper. It is in evidence that Plaintiff stated at the time that he could not take the whole of the salt in the hold of the barge, and that McDougall, the party who was acting on the part of Respondents, answered: "You can take a fine lot, so that you clear the ship, you can put it where you like." It is not customary, in taking cargoes between Quebec and Montreal, to specify in the bills of lading the portions of the cargo which may be under deck or above deck. "The barge *New Liverpool* could not carry a full cargo of salt in the hold, under deck. There is not one in twenty of barges on the river that can carry a full cargo in the hold, and, to put them in proper trim, they must have a portion of the cargo on deck." It is proved that in Torrance and Co's employ, they would not allow a cargo to be carried without putting a portion on deck. In my opinion, there is nothing to shew that there was anything improper in resorting to a deck load, and that, therefore, the defence set up on the part of Respondents, is not made out. It is said that the master was intoxicated at the time of the landing of the cargo, and that it was improperly handled; but there is nothing to shew that any specific given number of the bags was lost or injured by misconduct. It is proved that there was no objection made to the master by Defendants as to the carrying of the salt on deck. There was no survey held by them as to improper stowage or otherwise, nor was the master ever notified or protested by Defendants, for having carried or stowed any cargo in an improper manner. No protest or objection was ever set up by Respondents, upon any ground whatever; no survey whatever was ever given of the cargo, after its delivery, and it is proved that Respondents proceeded to sell the cargo a week or ten days after its delivery, without the knowledge of Appellant or of the master, or without any statement that they undertook to sell for his account and at his risk; though the account sales was rendered by Shipway, the auctioneer, to Respondents, there is nothing done on the part of Respondents, to have any statement of this transaction brought to the knowledge of Appellant, until the evidence is brought up at the trial. It is admitted that ten pounds were actually paid by Respondents, in part payment of the freight, which were received by Appellant, and it is only after more than a year, that any objection whatever is attempted to be set up by Respondents. "The liability of a carrier, to deliver the goods in-

trusted to him in good order, or to account for the damage in such a way as to exonerate him from his liability, ceases on the delivery to the consignee ;" and, in this case, Respondents accepted the cargo without a word of objection, without survey or protest, and it is not proved that the sale, which is alleged to have taken place a week or ten days after the delivery of the cargo, was with the knowledge of Appellant, or for his account and risk, as correctly stated in Appellant's factum. It seems to me, that, under the law of shipping: "Toute action en réparation du dommage souffert par la marchandise est non recevable si cette marchandise a été reçue sans protestation ;" as stated by Boulay Paty. (1) "Si celui à qui les marchandises ont été adressées, les a reçues sans se plaindre de l'état dans lequel elles étaient, on ne peut plus alléguer qu'elles sont endommagées." (2) "Il ne serait pas juste d'obliger le captaine à prouver, après un an, qu'il a réellement et de fait délivré les marchandises. Il serait d'une trop dangereuse conséquence pour la navigation et le commerce maritime, que des actions de cette nature eussent la durée ordinaire." (3). I cannot understand how a defence like that which was set up by Respondents can be held to be valid, unless there be proof of protest and survey, after the lapse of a year, and part payment of the freight, and I am, therefore, of opinion, that the judgment of the court below should be reversed, and that Appellant should recover the amount of freight, by the number of bags of salt actually delivered, as proved in evidence, less £10 already paid by Respondents.

MONDELET, Justice: I don't see any difficulty whatever in this cause. The Appellant had undertaken, and, by law, was bound, to deliver the salt at Montreal, "in good order and "condition," as he alleges himself in his declaration, "save "and except the act of God, the Queen's enemies, and all and "every the accidents of the sea and navigation of whatsoever "kind." Now, there is no proof of a special agreement to carry the salt on deck, nor of any custom so to do, which custom, even if it existed, could not exonerate Appellant from his obligation to deliver the salt in good order and condition. The Appellant has not shewn himself to have come within the exceptions enumerated in the bill of lading, and he stands before the court contradicting his two opposite positions, 1° leakage, as alleged, 2° washing over the barge. It is, moreover, plain, from the evidence, that the damage and loss are owing to the

(1) Vol. 4, pp. 605 et 606.

(2) Boulay Paty, vol. 2, p. 325.

(3) Boulay Paty, vol. 2, p. 602.

negligence and carelessness of Appellant and his captain. It follows, therefore, that Appellant's action has been rightly dismissed, and that the adjudication in favor of Respondents (as incidental Plaintiffs) of the sum of £48 9s., with interest from the 15th February, 1859 (date of the filing of the incidental demand) is correct. The judgment of the court below should be confirmed.

MEREDITH, Justice: In this case, I desire to observe that we do not impugn or even question the doctrines laid down in *Massue* vs. *Swinburn*. On the contrary, if the facts in evidence before us were the same as those in *Massue* vs. *Swinburn*, I would be guided by that case. When a consignee has reason to complain on account of the short delivery of his goods, he ought at once to protest, in order that the disputed facts may be investigated, whilst the truth can best be ascertained, and so as to give to the master and ship owner an opportunity of reserving any recourse to which they may by entitled. In like manner, when goods are delivered in a damaged state, if, by means of a survey, information can be obtained as to the cause of the damage, a survey should be had without any delay, and after due notice to the parties interested. Such a survey is particularly necessary where the consignee intends to keep the goods himself, because, in that case, even if the survey cannot throw light upon the cause of the damage, it may be the best mode of ascertaining the extent of such damages. In the present case, there was not and could not be any dispute as to the fact that the master of the *New Liverpool* had failed to deliver a considerable quantity of the salt which had been shipped on board his barge for the Respondents. The Plaintiff in his protest and in his declaration, in effect, admits the short delivery of a part of the salt; the real difficulty between the parties being, not as to whether there was or was not a short delivery of part of the cargo, but as to the cause of the short delivery, the existence of which has not only been clearly proved, but was admitted by both parties. The Plaintiff in the court below contended that the damage of which Defendants complained was caused by the dangers of navigation, which Defendants denied; and, upon this matter, in relation to which they thus differed, a survey could not have thrown any light which could not be obtained quite as well by other means; and, in the present case, as the consignees did not intend to keep, and were not bound to keep the damaged salt, the best mode of ascertaining the extent of the damage was by a public sale. Even if a survey had been held, any opinions expressed by the surveyors as to the diminution of the value of the damaged salt, could not outweigh the proof of the actual loss established by the result

of the public sale. I think, therefore, that the consignees, Respondents, cannot be held to have lost their claim merely in consequence of the failure on their part to protest, or in consequence of the want of a survey. Viewing the claim of the consigness, Defendants, independently of the objections to which I have adverted, the burthen of proof was upon Plaintiff to show that the damage of which Defendants complained was caused by the dangers of navigation, and I think not only that Plaintiff has failed to satisfy the obligation thus resting upon him, but that, as to this point, the preponderance of evidence is clearly in favor of Defendants, and I, therefore, am disposed to maintain the judgment of the court below. It has however been said that we would be guilty of inconsistency, if we dismissed the demand of Plaintiff, and did not, at the same time, dismiss the incidental demand of Defendant. That would be true if we dismissed the principal demand of Plaintiff for want of diligence; but we dismiss that demand, not for want of diligence, but because the preponderance of proof is in favor of Defendants, and the evidence is exactly the same on both issues. The Defendants have, beyond any doubt, suffered damage to the extent of £137.6.5, that being the difference between the cost price of the salt short delivered and damaged, and the proceeds of the sale of the same at public auction. On the issue upon the principal demand, we have given Defendants credit for £87 17s, part of the above sum of £137.6.5, and there appears to me to be exactly the same reason for allowing that part of Defendant's claim urged by the incidental demand that there is for allowing, upon Defendant's exception, the other part of the same claim. Indeed it seems to me that we should expose ourselves to the charge of inconsistency if we were to allow a part and reject the remainder of a claim, the whole of which rests upon exactly the same footing, both as to the pleadings and the evidence adduced. At the same time that I concur in confirming the judgment of the court below, I think it right to observe that, as I view this case, Defendants would have acted more prudently had they given Plaintiff special notice of the sale of the salt, but as Plaintiff has not alleged or proved that he has suffered, or is exposed to suffer any damage from the want of such notice, I do not think we ought to make it a ground for disturbing the judgment of the Superior Court.

Judgment confirmed. (4 *J.*, p. 371; 6 *J.*, p. 313, et 13, *D. T. B. C.*, p. 401.)

DUNLOP and BROWN, for Appellant.

TORRANCE and MORRIS, for Respondents.

INSOLVABILITE.—FRAUDE.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 16th December, 1859.

Before Sir L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

WITHALL (Plaintiff in the court below), Appellant, *and* YOUNG et al. (Defendants in the court below), *and* MICHON et al. (Intervening parties in the court below), Respondents.

Jugé : 1° Qu'un débiteur insolvable ne peut ni céder ou transporter son fonds de commerce à deux de ses créanciers, en fidéicommis, pour l'avantage de tous tels créanciers, et en paiement final de leur créance, sans leur consentement.

2° Que, lorsque un tel transport est fait sans le consentement de tous les créanciers, et que les cessionnaires, ayant obtenu du débiteur, le cédant, la clef du magasin, mettent tel magasin sous clef, et annoncent les marchandises en vente par encan, pour l'avantage des créanciers généralement, aucun des créanciers qui n'aura pas consenti au transport pourra, nonobstant icelui, saisir les effets comme étant encore en la possession du débiteur cédant, en autant qu'il n'y a pas eu de cession légale, ou livraison suffisante, pour transporter la propriété ou la possession aux cessionnaires. (1)

This was an appeal from a judgment of the Superior Court maintaining the intervention filed by Respondents to a writ of *saisie-arrêt simple* sued out by Appellant, in virtue of which certain goods were seized as of and belonging to Defendant, under the following circumstances: Young, Defendant, having become insolvent, by notarial deed of transfer, assigned and made over the whole of his stock in trade, assets and all and every other property of which he was possessed, to Respondents, Michon and Mulholland, two of his creditors, in trust for the benefit of the whole, in order to bring the same to sale, and dispose of them, and distribute the proceeds among all the creditors proportionally; the deed contained a further provision to the effect that all the creditors should have the right to become parties thereto, by ratifying the same within ninety days from the date thereof, which ratification should be a full discharge in favor of Defendant. The Defendant then gave the key of the shop to Respondents, who, thereupon, locked it up, excluded Defendant from all access to it, and made an inventory of the stock it contained. The Appellant, one of Defendant's creditors, refused to ratify the deed, and, sometime afterwards, Respondents, pursuant to advertisement in the public papers, proceeded to sell, at auction, the stock so assigned over to them by Defendant, when Appellant sued out a writ of *saisie-arrêt simple* before judgment, on an affidavit that Defendant " had secreted his estate, debts and effects, with

(1) V. art. 1981 C. C. et 763 C. P. C.

intent to defraud, &c.," in virtue of which the whole of the stock was seized as of and belonging to Defendant, and in his hands and possession. Upon this Respondents intervened, claiming the goods seized as theirs, in virtue of the deed of assignment and transfer above mentioned. The Appellant pleaded that the deed had been entered into collusively by Respondents and Defendant, with a view to defraud Appellant, and other creditors of Defendant, and that no delivery in law, by *déplacement*, had ever been made by Defendant to Respondents, and that, consequently, they were not proprietors nor in possession of the goods seized at the time of the seizure thereof; and that Defendant, being insolvent, could not assign over his stock to any of his creditors without the consent of the whole, and that the deed of assignment was therefore null and void. The court below maintained the intervention, declaring that there was no fraud, and that, at the time of the suing out of the *saisie-arrêt simple* and seizure made in virtue thereof, Respondents were in possession of the goods seized, that they had therefore been wrongfully seized as in the possession of Defendant, and that the seizure was therefore null, and that the goods must be delivered up to Respondents. It was from this judgment that the appeal was instituted.

PENTLAND, JOHN C., for Appellant, now argued that the deed upon which the intervention was founded did not convey to Respondents any property in the goods so transferred to them by Defendant; that it was simply a deed of transfer to Respondents, in trust, for the benefit of all the creditors; that it was further null because it had not been consented to by all the creditors; that Defendant being insolvent, no possession of his goods could pass to the detriment of any of his creditors; that there was no public *déplacement*, and that a mere symbolical delivery such as had been made by Defendant, even excluding the circumstances of insolvency and fraud, could not pass property unless supported by, and in execution of a prior valid sale or conveyance; that, since the repeal of the bankrupt laws, no power existed to enable a debtor to create a trust such as that contemplated by the deed in question; and that it was not competent for Respondents to contradict by parol testimony the return of the sheriff shewing that the goods were seized in the possesson of Defendant, which return was conclusive proof of the fact.

LANGLOIS, for Respondents, contended that there was no proof of fraud, the deed having been presented to Appellant for the purpose of obtaining his consent thereto, previously to its final execution; that the seizure was null inasmuch as the goods were, at the time it was effected, in the possession of Respondents, and as a proof of which, Appellant was com-

pelled to wait till the day of sale, before he could obtain access to the goods to effect the seizure, as Respondents were in possession of the key of the shop where the goods were; that Defendant being insolvent had a perfect right to assign over his stock to Respondents for the benefit of his creditors generally, as it was for their interest that he should do so; and the whole of the creditors should not be prejudiced because Appellant and one or two other creditors for paltry amounts, refused to assent to an arrangement entered into for the benefit of all parties.

MEREDITH, Justice, *dissentiente*, observed that Defendant appeared to have acted in perfect good faith; that he had made over to Respondents all that he was possessed of, for the benefit of his creditors generally, and more than this he could not be expected to do; and, moreover, that such a course was, under the circumstances, the best arrangement that could be entered into in the interest of the creditors, as being the least expensive way of bringing his goods to sale and distributing the proceeds proportionally among them; that, if the contrary course were pursued, and the goods were sold by sheriff's sale, the consequence would be that all the creditors would have to file oppositions for their respective claims, by which means, in all probability, the greater portion of the proceeds of the sale would be expended in law expenses, and the creditors would not realize near as much as they would by the course which Defendant had adopted; that the seizure effected by Appellant was null inasmuch as the goods were not in the possession of Defendant at the time it was effected, but, on the contrary, were, and for sometime previously, had been, in the possession and under the absolute control of Respondents; for these reasons, the judgment of the court below ought to be maintained.

AYLWIN, Justice: The court here is bound to carry out the law; if it is a hardship, the parties aggrieved can apply elsewhere to have the hardship removed, arguments *ab inconvenienti* cannot rule courts, but I am far from admitting in the present case that any such hardship exists, and, as to the expense of oppositions, I do not think the expense would be much greater, when you take into consideration the charges af a notary, of an auctioneer, and of a number of other intermediate agents; this argument *ab inconvenienti* is, therefore, no argument at all. Even admitting the transfer made by Defendant to be correct and in good faith, it could not transfer the property so long as there was no asportation. The bankrupt debtor had no right to impose such conditions upon his creditors, as to say, give me a clear discharge, otherwise, I will not assign over my stock to you. One creditor has an

undoubted right to prevent an arrangement with the other creditors to his prejudice. (1) But is it supposed that there is no law in Lower Canada to regulate the case of a bankrupt? Now the author who discusses this point most lucidly and ably is Bell, in his commentaries on the law of Scotland which is closely assimilated to our own, and is a commentary on the law merchant, and he shows most clearly that, at common law, these assignments are fraudulent. (2) This also is the doctrine laid down by all the continental writers. In the Italian republics and communities the seat of the origin of commerce, it was always held, that where an insolvent debtor made an assignment to any party aware of his insolvency, he thereby transferred no property nor possession; such assignments were absolutely null. It may be asked when this law was introduced into France, it was introduced with commerce itself as the law merchant. France was not essentially a commercial country, so it took its law in these matters from the Italiam communities. Without reference to the *Ordinance* of 1673, we have the law in existence before that *Ordinance* was promulgated. I refer to the *Ordinance* of 1679 and 2 *Edits et Ordonnances*, p. 38, and other authorities without number might be cited to establish this, but, as they have already been cited in a case decided in Montreal, it is unnecessary to repeat them here. The interpretation of our own statutes respecting the issuing of writs of *saisie-arrêt* is in support of the common law, and they place the insolvent debtor at the mercy of his creditors, to relieve himself from the effects of which, he must make a *cession*, not to one, two or three of his creditors, but unconditionally to the whole of them, and on the first demand made by them, and if he does not consent to this, then he renders himself liable to their provisions; until our legislature reenacts a bankrupt law, we are bound to adjudicate in this case by the *Coutume de Paris*, by the common law of the country. The court, therefore, is of opinion that the transfer made by Defendant is null and void; that the property in the goods remained the same, and that they were liable to seizure; the judgment of the court below is therefore reversed.

MONDELET, C., Justice: The question which arises here, is whether an assignment, such as the one we have now under consideration, that is an assignment, by a trader of his stock in trade, assets and moveable and immoveable property, he being insolvent, to a certain number of his creditors, one or

(1) 2 Boulay Patty, p. 76; 1 Renouard, p. 49; *Coutume de Paris*, art. 179 et suivants; Nouveau Denisart, vbo *Abandonnement*, sec. 3.

(2) 2 Bell's Comm., pp. 244 and 545; also 1 Smith's Leading Cases here referred to.

more of all his creditors, reserving either to become parties thereto, or to ratify it, is legal and valid, and whether the Courts should maintain such assignments, supposing and admitting for the sake of argument that they are not made fraudulently. I am of opinion that what may be termed the equity of the case, and all the arguments *ab inconvenienti* which may be brought to bear upon this question, cannot in any way be successfully opposed to the principle that, the moment a debtor becomes insolvent, all that he is possessed of becomes *le gage commun des créanciers,* aud that it is not in the power of that insolvent debtor to assign to, or for the creditors to accept such assingment and transfer, unless they are all agreed. Much less can such a thing legally be done, when, singularly enough, a part of the creditors take upon them selves, as they have in the present instance, to declare, that after the expiration of ninety days which they allow for the ratification of the transfer, it shall be a discharge to the debtor. I should like to know what right they have to issue such a decree. A good deal may, no doubt, be said as to the pretended equity of the case, and that this course was the best and the least expensive that could be devised. But the answer is at hand. It may appear equitable to some, and very dangerous to others, one only safe course, that which is a safeguard and protection to all, is to shew no preference, no lenity, but to consider all the creditors, as in fact and in the eyes of the law, they are, upon one and the same footing. The contrary course would and must place the parties in a very precarious position, the will, the arbitrary will or appreciation of the judge who will have it in his power to substitute his own system of equity (*une chimère comme le dit Toullier*) to a true inflexible principle or rule, working equally for and against all the creditors. In the present instance, a suit, execution, opposition, distribution, &c., may absorb a considerable part of the insolvent estate, but that does not affect the principle, because, supposing the stock in trade, the assets, the moveable and the immoveable property of the insolvent debtor were considerable, the same inconvenience would not arise. All that is relative, and it only shows the danger of such a system of pretended equity being carried out in this as well as in all cases of a similar nature. The amount is of no valid consideration, but the principle is of paramount importance. In the case of *Cummings* vs. *Smith*, from the district of Montreal, it was this inflexible principle which has had its due weight with me, and the invariable rule must be laid down, that unless the creditors are all agreed such transfer is of no value. (1)

(1) Cugnet, p. 66, arts. 79 et 180, Coutume de Paris.

But it will be said, one creditor is by that means permitted to dictate to all the others. By no means, but what is truly the case is that some of the creditors presume to dictate to the others. Because there may be cases where the creditors in favor of this assignment have only one of a majority, say 31 against 30. Can it be denied that in such a case, it would be a dictation by 31 coercing the consent of 30 ? Assuredly not. Now,let us suppose another contingency ; let us suppose that an assignee, or several assignees, who have realized a large sum of money out of the estate, come to fail ? What then ? Why will it be answered : the minority as well as the majority of the creditors are safer with apparently solvent assignees than with an insolvent debtor. No doubt, as long as your assignees are solvent, but the moment they become insolvent, are you not in a worse position ? You certainly are. Because if no such assignment had taken place, the usual course of suing, seizing, selling and then distributing the monies would leave to each creditor his proportionate share. Better have less, than lose all. As to the pretention of Appellant to be paid in full, it only proves him to be unreasonable in that respect, it does not alter the state of the question. It has been also pretended that *it is in evidence by witnesses* that the goods were not seized in the possession of Defendant. That they were then in the hands and possession of the assignees, the intervening parties. But what do you say to the sheriff's return, whereby it is made legally certain that the goods have been seized in the possession of Defendant, can you set it a side, certainly not, and those who think there must be an *inscription de faux*, cannot easily pretend the contrary ? I think, however, that this court should say that the transfer and assignment have not legally dispossessed Defendant. In fact there has been no *déplacement*. Upon the whole, I opine for the reversal of the judgment. The intervention should be dismissed upon the principle that the transfer and assignment is null.

Judgment reversed. (10 *D. T. B. C.*, p. 149.)

PENTLAND and PENTLAND, for Appellant.

CASAULT and LANGLOIS, for Respondents.

HUISSIER.—EXECUTION.

COUR DE CIRCUIT, Québec, 25 avril 1859.

Présent : STUART, Juge-Assistant.

LEMIEUX, Demandeur, *vs.* COTÉ, Défendeur, et COTÉ, Opposant.

Jugé: Qu'un huissier peut exécuter un writ de *fieri facias de bonis* contre son beau-frère, ou autre allié, nonobstant les dispositions de la 12[e] Vict., cap. 38. (1)

Un writ de *fieri facias de bonis* contre le Défendeur, avait été exécuté par un huissier, beau-frère du Défendeur. Celui-ci fila à cette saisie une opposition à fin d'annuler, fondée sur ce que l'huissier ne pouvait exécuter contre son parent, et concluant à ce que, pour cette raison, la saisie fût annulée.

PER CURIAM : La cour est d'opinion que cette raison n'est pas suffisante pour faire mettre de côté la saisie faite en cette cause. Par la 12[e] Vict., chap. 38, les pouvoirs donnés aux huissiers sont les mêmes que ceux donnés au shérif, en vertu de la 25[e] Geo. III, ch. 2, et rien, dans ce dernier acte, n'empêche le shérif de faire des services, saisies ou aucune autre procédure contre ses parents. Les procédures qui doient être suivies sur les saisies sont exclusivement réglées par cette dernière loi. Pour ces raisons, la cour renvoie l'opposition avec dépens. (10 *D. T. B. C.*, p. 184.)

DUVAL et TASCHEREAU, pour l'Opposant.

CASAULT et LANGLOIS, pour le Demandeur.

PREUVE.—INJURES.

QUEEN'S BENCH, IN APPEAL, Quebec, 13 March, 1860.

Before Sir L. H. LAFONTAINE, Bart., C. J., AYLWIN, J., DUVAL, J., MONDELET, J. BADGLEY, J.

LAVOIE, Appellant, and GAGNON, Respondent.

Jugé : Que dans une action pour injures verbales, les paroles dont on se plaint doivent être prouvées.

Il semble que, lorsqu'un procureur, dans le cours d'un procès, fait des remarques sur le caractère d'un témoin, en conséquence d'instructions reçues de son client, sa défense dans une action pour injures sera favorablement reçue.

This was an appeal from a judgment of the Circuit Court for the district of Saguenay, dismissing Appellant's action brought against Respondent for the sum of £50, for alleged verbal slander. The declaration sets out that, in a certain cause

(1) V. art. 74 C. P. C.

then pending in the Commissioners' Court, at Baie St. Paul, in the district of Saguenay, between one Néron, Plaintiff, and one Danais, Defendant, Respondent, a shop-keeper, acting as the attorney of Néron, in that cause, stated in open court, that he, the Appellant Lavoie, who was a witness in that suit, was not to be believed on oath; that he had previously committed perjury, and that Respondent could prove it, if it were necessary.

LANGLOIS, for Appellant, contended that, in making use of the expressions complained of, Respondent had exceeded his powers and privileges as *procureur;* no such license as he had assumed was permitted, even to a professional man, when conducting a case, and, more especially, was it unjustifiable and illegal on the part of a man, a trader by occupation, who without any professional knowledge, thought proper to take upon himself the conduct of a suit as the Respondent had done. (1)

GLEASON, for Respondent, maintained, firstly, that the judgment appealed from must be confirmed, because the words were not proved as laid, and that the attorney *ad lites* was not responsible in law. (2) (AYLWIN, J. Why refer to english authorities, they are not law in such a case as this), I cite them as the language of reason. (The Chief Justice. It is no use citing them, we will not take notes of them); he maintained, secondly, that the action was untenable, even according to the french authorities. (3)

AYLWIN, J.: I dissent from the judgment of the court in both these cases. They present points of great importance to the public. If the defence set up had been, that the *procureur* or Defendant, used the language complained of, in pursuance of instructions from his client, and with authority from him to use such expressions towards the witnesses, such a defence would be received favorably; and, in such a case, it would be necessary for him to bring up his client and prove the authority, and also his power of attorney to act as *procureur*. This, however, Defendant has failed to do, and, from circumstances disclosed in these cases, it appears that he did so, not only without authority from his client, but from a feeling of enmity towards Plaintiffs, in consequence of their having previously been witnesses against him in another case in which he was personally interested. In addition to this, there is an entire

(1) 1 Sourdat, *De la responsabilité*, pp. 355, 356; 5 Marcadé, p. 271; Guyot; *Répertoire*, vbo *Avocat.*

(2) 2 Starkie, *on Evidence*, pp. 862, 863; 10 English Common Law Reports, p. 380.

(3) 5 *Dalloz*, vo *Défense.*

absence of proof that he ever received any instructions whatever from his client to make use of the language complained of. I do not think that it is necessary in cases of this kind, to prove the exact words, although some of the witnesses have done so; it is merely necessary to prove the substance. In this case, the rules of evidence have been entirely subverted. In commercial cases, we have english law, but in other cases french rules of evidence obtain, there are, however, certain rules for the examination of witnesses laid down in England, which are so wise and just as to be of universal application, one of which is, that you shall not be allowed to contradict a witness, unless you first ask him: " Did you, or did you not " on such an occasion, and in the presence of such a one, do or " say so and so ? " And then, if he should deny it, take the proper measures to contradict him. Another rule is that every man's character is to be considered good till the contrary is proved; and evidence, therefore, to the effect that a witness will not tell the truth, because he is on bad terms with the party to the suit, is inadmissible by all the rules of evidence which obtain in England. I am of opinion that Defendant exceeded his limits as attorney, and I am not disposed to allow too much latitude to unprofessional men who think proper to act in this way. I would therefore have imposed upon him a fine of five pounds. Let this man attend to his lawful business, and leave the duty he undertook to perform, on the occasion, to professional men who devote a period of years to the study and practice of the profession. If a professional gentleman had been conducting the cases in question, the language complained of by Plaintiffs, as witnesses in these cases, would not, in all probability, have been used towards them. If a majority of the court had been with me, I would have compelled Defendant to go before the court where he used the expressions, and declare that Plaintiffs were men who were worthy of belief; and whose evidence was, in every respect, entitled to credit; and, if he should not think proper to do so, I would impose damage accordingly.

MONDELET, Justice: It would be strange law, if, when a man is sued for slander, he could relieve himself from all responsibility by going before the court where he uttered it, and withdraw his expressions. It would be like the case of a man at *Rivière du Loup*, who, being requested to do so, said: "I would willingly do so, but it is against my conscience." Well in this case, Gagnon might say the same thing, and what satisfaction would this be to Appellant. In this case, the judgment must be confirmed, as the expressions complained of have not been proved; and it would entirely subvert the ends of justice, if, after one expression is complained of, and Defendant

pleads, another were allowed to be proved and Defendant condemned upon it. The offence complained of must be proved. No suitor is bound to employ a lawyer, therefore, I abstain from making any reflexions upon Defendant for not being a lawyer. (1) The witnesses do not agree as to the words used, and the allegations are not proved as laid in the declaration.

DUVAL, Justice: The evidence is contradictory as to the words used, even the very magistrates before whom the case was argued in which the expressions were used, swear that the words complained of were not used by Respondent; and these gentlemen would of course recollect whether the words had been used or not, and upon their evidence alone I would have been disposed to dismiss the case: the judge who preside in the Circuit Court had these gentlemen examined before him, and was consequently in a better position than we are to judge of the value of their testimony. It was not necessary for Gagnon to produce his power of attorney, because his quality has been admitted by Appellant in his declaration. If a person acting as Respondent, could shew that he was justified to a certain extent in attacking the character of a witness, in virtue of instructions from his client, I would not be disposed to treat such conduct rigorously.

Judgment confirmed. (10 *D. T. B. C.*, p. 185.)

CASAULT and LANGLOIS, for Appellant.

FOURNIER and GLEASON, for Respondent.

AVOCAT.—CAUTIONNEMENT.

QUEEN'S BENCH, APPEAL SIDE, Québec, 25 mars 1860.

Before Sir L. H. LAFONTAINE, Bart., C. J., AYLWIN, J., DUVAL, and C. MONDELET, Justices.

LEMELIN, Appellant, and LARUE, Respondent.

Jugé: Qu'un avocat pratiquant ne peut se rendre caution sur appel de la Cour Supérieure sans enfreindre la 6e règle de cette cour; que la pratique de se rendre ainsi caution est irrégulière et doit être discontinuée (2)

TESSIER, for Respondent, moved for the dismissal of the appeal, on the ground that the security in appeal, as required by law, had not been put in, inasmuch as the bail were Ca-

(1) V. arts. 23 C. P. C.

(2) The 6th rule of the Superior Court provides, that: "No barrister or attorney, prothonotary, sheriff, crier, bailiff or sheriff's officer, shall be bail or surety in any action or proceeding cognizable by this court, or by any judge thereof."

sault and Langlois, practising barristers and attorneys, and also the attorneys *ad item* of Appellants ; and that barristers could not become bail or surety for their clients. (1) It was also in contravention of the 6th rule of practice of the Superior Court : and the policy of the law was good in providing that attorneys should not become bail for their clients, and thus become personally interested in the cause they undertook to defend, which would, in many instances, render them unable to defend their client's interests with the calm deliberation and sound judgment necessary in the exercise of their professional duties.

CASAULT, for Appellant, maintained that the rule of practice of the Superior Court which had been invoked did not apply to, and could not control or regulate the proceedings of this court. He alleged, as a reason why he and his partner had become surety in the case, contrary to their usual custom, that Appellant resided at a considerable distance from Quebec, that they had telegraphed him to give the name of his bail or sureties, and that they had received an answer from his wife stating that her husband was 27 miles in the woods, and that there would be no means of communicating with him for several days ; upon which, finding that he was not known to any one in Quebec, who would go bail for him, and seeing that the delay to put in security was about to expire, whereby their client would lose his appeal, they had, at the last moment, signed the bail-bond. That such bail or security was not illegal, because it had been practised before in the cases, among others, of *Levey* vs. *Badgley*, *Ferguson* vs. *Rogers*, and *Sir James Stuart* vs. *de Lagorgendière*.

MONDELET, Justice : I dissent from the majority of the court. With respect to the rule of the Superior Court which has been invoked, I do not think that the judges of that court could ever think of making rules for the observance and guidance of the Court of Appeals ; and this court, I am sorry to say, in my humble opinion, is going to render a very strange judgment ; for, notwithstanding that all the judges of the court are of opinion that it is a practice which ought to be put down, and one judge holds that it ought to be allowed in the present case, yet the court is going to [illegible]gate an *arrêt* or *règlement*, which, while declaring [illegible]bail-bond illegal, will permit the party to put in another bail-bond. Now, I do not believe in courts making *arrêts* or *reglements*, and, further, that neither this, nor any other court in this country, has power to do so ; I know that, by an *arrêt*

(1) Ferrière, *Dict. de droit*, vo *Procureur*, p. 438 ; 2 Jousse, *Justice civile*, p. 458 ; Répertoire de Guyot, *vo* Procureur ; 2 Domat, *Droit public*, p. 178 ; *Routhier* vs. *Gingras*, 3 R. J. R. Q., p. 423 ; Serpillon sur l'Ord. de 1667, p. 526.

of 1685, the courts, in Paris, did make *règlements*, but it was never in force in this country. I would have preferred, seeing that the bail-bond is not a nullity by law, that, in this case, it should have been allowed to remain, because, I defy this court to say that there is a law declaring this bail-bond null; if then, there is no law to this effect, how can the court declare it null? What I would wish is, that, not by an *arrêt* or *règlement*, but, by a rule of practice, this court would prohibit it to be done in future, and thereby stop such proceedings for ever, as I entirely agree with the majority of the court, that it is a practice which ought to be put down.

DUVAL, Justice: If the rule of the Superior Court regulates the proceedings of putting in bail in appeal, then, our course is plain, and we ought to enforce it, subject however to the discretion with which all courts are invested. Now, is this a proceeding in the Superior Court? We think it is, because it is in the Superior Court that the bail is given. This then being the case, are the circumstances of this case such as to warrant the deviation by Appellant from the rule of the Superior Court? We think so; this is not the first time it has been done, and, therefore, he acted upon practice previously adopted; we, therefore, think we will best subserve the purposes of justice by saying to Appellant, we will not declare the bail-bond valid, but, under the circumstances, we will give you time to put in proper bail.

AYLWIN, Justice: As to the rule of practice which has been invoked, great diversity of opinion has always existed; and, in the legislation of modern France, no restriction is imposed at all in this matter. Now, where was the bail put in, in this case? In the Superior Court, of course, and, therefore, the rule is binding. But the court is invested with a discretionary power, and, inasmuch as the rule has frequently been deviated from before, although I do not know that a case where the attorney of the party to the suit has become bail has ever been pronounced upon before, yet, I know that other cases where attorneys have been bail, have been frequently decided, therefore we do not say that the bond is null, but that it is irregular, as being in contravention of the rule of practice, and it is to be hoped that this will put an end to the question for ever. Our desire is not to pronounce an *arrêt* or *règlement*, although I think such an *arrêt* would be in conformity with the law of France, and, therefore, we hope that the gentlemen of the bar will conform with the rule now laid down. The judgment of the court therefore pronounces the bail-bond irregular, and permits Appellant to put in proper bail. (10 *D. T, B. C.*, p. 190.)

CASAULT and LANGLOIS, for Appellant.

TESSIER and ROSS, for Respondent.

PROCEDURE.—PLAIDOYERS.

SUPERIOR COURT, Quebec, 5th April, 1860.

Before STUART, Assistant-Judge.

LES DAMES RELIGIEUSES URSULINES DE QUÉBEC, Plaintiffs, *vs.* PERRY, Defendant.

Jugé : Qu'un plaidoyer de paiement allégué avoir été fait à diverses époques antérieures à l'institution de l'action, qui n'indique pas les dates et les montants de tels paiements est insuffisant, et sera déclaré tel sur défense au fonds en droit.

This was an action for ground rent. Plea payment, at different periods, previously to the institution of the action.

BOSSÉ, for Plaintiffs, demurred to the plea, on the ground that it did not state the dates and amounts of the different alleged payments.

PENTLAND, J. C., for Defendants, argued, that it was not necessary to do more in his plea than merely allege payment previously to the institution of the action; and that, subsequently, the plea could be substantiated by proof of the several payments.

STUART, Justice: The plea ought to have set forth the dates and amounts of the alledged payments, not having done so, it must be dismissed and the demurrer maintained. (10 *D. T. B. C.*, p. 194.)

BOSSÉ, for Plaintiffs.

PENTLAND and PENTLAND, for Defendant.

APPEL.—PREUVE.

QUEEN'S BENCH, APPEAL SIDE, Québec, 16 mars 1860.

Before SIR L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, J., DUVAL, J., MONDELET, J., and BADGLEY, J.

BERRY, Appellant, *and* MAY, Respondent.

Jugé : 1° Qu'un jugement déclarant nul un writ de *capias ad respondendum* est un jugement interlocutoire, duquel on ne peut interjeter appel *de plano.* (1)

2° Que la copie de la procédure dans une cause fait preuve concluante, et la cour n'ira pas au delà afin de constater l'effet d'un jugement subséquent non compris en icelle, et auquel il n'est pas référé.

This was a motion by Respondent to dismiss the appeal, on the ground that it had been instituted *de plano,* instead of "leave to appeal" having been first prayed for.

(1) V. art. 823 et 1119 C. P. C.

POPE, THOS., for Respondent: This appeal has been instituted from a judgment of the Superior Court quashing the writ of *capias ad respondendum*, issued against Respondent and cancelling the bail-bond. It is an interlocutory judgment, within the meaning of the Ord. 25 Geo. III, cap. 2, sec. 24; consequently, an appeal therefrom cannot be allowed "except "upon motion made in the Court of Appeals for that purpose, "and a rule served upon the other party or his attorney, to "shew cause why a writ of appeal from such interlocutory "sentence or judgment should not be granted." No motion to this effect has been made, but the appeal has been instituted, *de plano*, as though the judgment of the court below was not of an interlocutory, but of a final character.

HOLT, for Appellant: The appeal, *de plano*, has been rightly instituted. Although the judgment referred to is of an interlocutory nature, yet, since it has been pronounced, and previously to the issuing of the writ of appeal, final judgment has been rendered in the cause, so that the controversy between the parties is at an end in the Superior Court. The Appellant could not pray for leave to appeal after the rendering of the final judgment. I now produce a certified copy of the final judgment; and, if need be, I will move that the appeal be considered as allowed. Had the appeal been brought previous to the rendering of the final judgment, a motion for leave to appeal would have been necessary; but the final judgment having been pronounced, before the writ of appeal issued, Appellant was entitled to his present proceeding, for the particular judgment complained of has thus become final.

POPE, THOS., in reply: The question just raised cannot apply to this case. The transcript makes no mention whatever of final judgment having been rendered. The only papers sent up are the affidavit of Appellant upon which the *capias* issued, the declaration and the motion to quash. They have been sent up, at Appellant's instance. The last proceeding embodied in the transcript is the interlocutory judgment in question; at which date, as the transcript shews, the case was set down for a jury trial. I object to the production of the copy of the final judgment referred to, it forms no part of the record or transcript sent up. Had the latter evidenced the existence of a final judgment, it would have been competent for Respondents to shew why the interlocutory judgment complained of could not now be disturbed. We are bound by the transcript, and as it does not establish the rendering of any final judgment, Appellant cannot maintain his present proceeding.

The court dismissed the appeal, on the ground that the transcript shewing that the judgment was interlocutory only,

the court could not go beyond it, and that the appeal could not, therefore, be instituted *de plano*. DUVAL, Justice, dissenting. (10 *D. T. B. C.*, p. 195.)

HOLT and IRVINE, for Appellant.

POPE, THOS., for Respondent.

ASSIGNATION.—DEPOSITION.—DECLARATION.—CAPIAS.

SUPERIOR COURT, Quebec, 5 December, 1859.

Before BOWEN, Chief-Justice.

BERRY, Plaintiff, *vs.* MAY, DEFENDANT.

Jugé : 1° Que, " de la cité de Kingston, Canada Ouest," indique suffisamment le domicile du Demandeur. (1)

2° Que " dépose et dit." dans un affidavit pour *capias*, comporte que le déposant a été dûment assermenté ; et qu'il n'est pas nécessaire de dire " ayant été dûment assermenté, dépose et dit." (2)

3° Qu'il n'est pas nécessaire en alléguant un billet promissoire de dire où tel billet a été fait. (3)

4° Qu'il n'est pas nécessaire maintenant d'alléguer dans un affidavit pour *capias*, que, sans l'avantage d'un tel writ le Défendeur pourra perdre son recours.

5° Que, " à Québec," dans le jurat, indique suffisamment où le déposant a été assermenté.

6° Que la date du mois ou l'année peuvent être écrits en chiffres dans le jurat.

The action was commenced by a *capias ad respondendum* which issued upon the affidavit of Plaintiff ; the affidavit in question, in so far as it relates to the points decided in the cause, was as follows : " Edward Berry, of the city of Kingston, Canada West, merchant, carrying on trade under the name and style of E. Berry and company, maketh oath and saith, that Henry May, of the place called Bridgewater Cove, near Quebec, merchant carrying on business under the name and style of H. May and company, is personally and justly and truly indebted to this deponent, in the sum of three thousand, five hundre and sixty-one dollars and twenty-five cents, the amount of a certain promissory note, made on the twenty-eighth day of September, one thousand eight hundred and fifty-nine, at two months, by May, in favor of Berry, for value received, and delivered to Deponent, and which fell due on the first day of December, one thousand eight hundred and fifty-nine &c. And this Deponent saith that May is insolvent and hath stopped payment, and that this deponent

(1) V. art. 49 C. P. C.

(2) V. art. 798 C. P. C.

(3) V. art. 50 C. P. C.

hath every reason to believe, and doth verily believe, that May hath secreted his property with intent to defraud this deponent. By means whereof, without the benefit of a writ of *capias ad respondendum* to arrest the body of May, this deponent may lose his said debt, or sustain damage." Upon the return of the action, motion was made, on behalf of Defendant, to set aside and quash the writ of *capias ad resp.*, for the following reasos : 1° because Edward Berry, who made the affidavit, on which the writ of *capias* issued is not described in the affidavit as being of, or *residing in any place, known to the law of this* province, or of which the court *could take cognizance ;* 2° because it doth not appear in the body of the affidrvit, that Berry was duly sworn to the truth thereof ; 3° because the affidavit does not specify at what date or period the first two promissory notes, therein mentioned, were made payable, and because the allegation respecting the same is vague ; 4° because it is not stated at what place the promissory notes *were made*, nor when the same were delivered to Berry ; 5° because it is not stated in the affidavit, that Defendant hath secreted his property with intent to defraud his creditors ; 6° because it is not stated that, by reason of the alleged secreting of Defendant's property, Berry *might be deprived of his remedy* against Defendant ; nor that he might be deprived of such remedy, without the benefit of a writ of *capias ad respondendum :* 7° because it does not appear that the affidavit was sworn to at any place or city, nor does it appear where the same was sworn to ; 8° because it does not appear when the affidavit was sworn to ; 9° because the affidavit contains figures and abreviations in the *jurat* thereof, and because the same are insufficient to denote any period at which the affidavit was sworn to.

JUDGMENT : Take nothing by motion. (13 *D. T. B. C.*, p. 3.)

HOLT and IRWINE, for Plaintiff.

POPE, T., for Defendant.

EXECUTION.—BAIL.

SUPERIOR COURT, Quebec, 3th April, 1860.

Before BOWEN, Chief Justice.

HOBBS et al., Plaintiffs, *vs.* JACKSON et al., Defendants, *and* JACKSON, Opposant.

Jugé : Que des créanciers ne peuvent saisir et vendre le terme non expiré du bail de leur débiteur ; ce droit n'existant qu'en faveur du propriétaire, en vertu de la 16 Vic. chap. 200, sec. 11, qui est une exception au droit commun. (1)

An opposition *à fin d'annuler* was filed to the seizure, *criée*, sale and adjudication of the unexpired term of the lease of the house and premises occupied by the Opposant, one of the Defendants. The opposition alleged, that, in virtue of a judgment obtained by one Deguise, the *effets* of the Opposant had been seized and sold by the sheriff, for the arrears of rent due to Deguise, in virtue of said lease. That the proceeds of the sale were before the court, for the purpose of distribution amongst the creditors of Defendant. That Deguise had further filed an opposition *à fin de conserver*, claiming rent up to the 1st day of May then next ; and which sum had not yet been paid to him. That the lease would not expire until the first day of May, 1861 ; and that Deguise, not having claimed to be paid rent beyond the first day of May, 1860, and Opposant having a right to use and occupy the house and premises, in virtue of the lease up to the first day of May, 1861, the seizure made by Plaintiffs, of the unexpired term of the lease, to wit, the year ending 1st May, 1861, was null, because Plaintiffs could not, by law, legally seize and sell the unexpired term of the lease, but that the creditors of Opposant could, by obtaining a subrogation to the rights of Deguise, after payment to him of the rent of the unexpired term of the lease, either claim rent from him, Opposant, or sublet the house and premises.

PENTLAND, for Opposant, contended, that the unexpired term of the lease belonged to the proprietor, and could not, therefore, be seized by the creditors of the tenant.

LANGLOIS, for Plaintiffs, argued that the unexpired term of the lease being a moveable, was seizable by the creditors of the tenant, and that Defendant could not oppose such seizure and sale, inasmuch as he was not interested ; and that, so long as the proprietor did not oppose such seizure and sale, it was not competent for the tenant, their debtor, to do so.

PER CURIAM : The right to seize the unexpired term of a lease exists only in favor of a landlord against his tenant,

(1) Cette disposition n'est plus en force. V. art. 553 C. P. C.

under the provisions of the 16 Vic., cap., 200, sec. 11, and is an exception to the common law; the seizure must therefore be set aside. (10 *D. T. B. C.*, p. 197.)

CASAULT and LANGLOIS, for Plaintiffs.
ANDERSON and PARKIN, for Opposants.
PENTLAND and PENTLAND, Counsel.

CAPIAS.—AFFIDAVIT.

SUPERIOR COURT, Quebec, 1er mai 1860.

Before STUART Assistant-Judge.

L'HOIST *vs.* BUTTS.

Jugé : Qu'un affidavit pour *capias*, qui allègue, "que le Défendeur est sur le point de laisser la Province ; et que les raisons que le déposant a de croire que le Défendeur est sur le point de laisser la Province avec intention de frauder le Demandeur sont..., etc.," est insuffisant sous les dispositions de la 12e Vic., ch. 42, sec. 2. ; et que l'affidavit doit alléguer spécialement que le Défendeur est sur le point de laisser la Province avec intention de frauder, etc. (1)

The affidavit to hold to bail ran thus : " Que le déposant est " croyablement informé, a toute raison de croire, et croit, sin- " cèrement, en sa conscience, que le dit William P. Butts est " immédiatement sur le point de laisser la province du Ca- " nada ; et que, sans le bénéfice d'un *capias ad respondendum* " contre le corps du dit Butts, lui, le dit Jean L'Hoist pourra " perdre sa dette contre Butts ; que les raisons que le dit dé- " posant a de croire que Butts est sur le point de laisser la " province du Canada, avec intention de frauder ses créanciers " sont, etc."

PENTLAND, J.-C., moved to quash the writ of *capias*, on the ground that the provisions of the statute were not complied with, inasmuch as the affidavit did not allege that the Defendant was about to leave the Province, with intent to defraud, &c ; that it merely set forth that he was about to leave the Province ; and observed that, in cases like this, where the personal liberty of the subject was concerned, the strict letter of the law ought to be complied with, and every allegation required by the statute inserted in the affidavit.

TALBOT, for Plaintiff, contended that the concluding sentence in the affidavit, in which it was alleged that deponent's reason for believing that Defendant was about to leave with intent to defraud, &c., involved the allegation that he was about to leave with such intent, and was therefore sufficient,

(1) V. art. 798 C. P. C.

and had been so held in nearly analogous cases by previous decisions. (1)

STUART, Justice: The fact of the intent of Defendant, by the provisions of the statute, is a substantive allegation, and it must be laid in the affidavit precisely as prescribed by the statute. The affidavit here does not allege that Defendant is about to leave *with intent to defraud, &c.*, but merely assigns the reason for his belief that he is about to leave with such intent, this is not equivalent to the allegation required by the statute, and, in cases to hold to bail, the strictest and most positive language must be used; the motion to quash must therefore be maintained and the *capias* quashed. (10 *D.T.B.C.*, p. 204.)

TALBOT, for Plaintiff.

PENTLAND and PENTLAND, for Defendant.

PROCEDURE.—JUGEMENT.—DEFENSE EN DROIT.

SUPERIOR COURT, Québec, 2 mai 1860.

Before BOWEN, Chief-Justice.

ROUTH, Plaintiff, *vs.* MAGUIRE, Defendant, and MAGUIRE *et al.*, Opposants.

Jugé: 1° sur défense en droit, que l'on ne peut pas, au moyen d'une contestation à une opposition à fin d'annuler, fondée sur un jugement en séparation de biens, attaquer ce jugement.

2° Que l'on peut filer une défense en droit à un des chefs d'une exception, quoique les autres chefs soient valables. (2)

The Plaintiff, having obtained judgment against Defendant, sued out execution, in virtue of which certain articles of merchandise and furniture were seized as of and belonging to Defendant. The Defendant's wife then filed an *opposition à fin d'annuler*, in which she alleged herself as *séparée de biens* from her husband, by a judgment *en séparation* duly executed, and claimed the effects seized as being her property. The Plaintiff filed an *exception péremptoire en droit*, the first count of which set forth, that Opposant was not entitled to her judgment *en séparation de biens*, because she was not skilled in any trade or business, whereby she might be benefited by a judgment *en séparation de biens*; that she had brought no money or effects whatever into the *communauté de biens* with her husband, her interest in which would be prejudiced by a continuance of the *communauté*; that the judgment *en*

(1) 4 *R. J. R. Q.*, p. 212. *Larocque vs. Clarke.*

(2) V. art. 147 C. P. C.

séparation de biens had been obtained by her with a view to defraud Plaintiff and other creditors of her husband, Defendant. The exception contained other counts alleging fraud and collusion between Defendant and Opposant, with the view of defrauding Plaintiff and other creditors of Defendant; and also that the goods seized were the property of Defendant, and not that of Opposant, and concluded by praying that the judgment *en séparation de biens* be set aside and declared null and void, and the articles seized declared to be the property of Defendant.

POPE, RICHARD, for Opposant, now demurred to the first count of the plea, alleging, that the validity of the reasons and grounds on which the judgment *en séparation de biens* in favor of the Opposant was rendered, could not be attacked by a plea in contestation of an opposition founded upon that judgment; that it was competent for any of the creditors of Defendant to have interfered in the manner prescribed by law, to prevent Opposant from obtaining her judgment *en séparation de biens*, but, having failed and neglected to do so, and having allowed her to obtain her judgment *en séparation de biens*, they must be presumed to have acquiesced in it, and were, consequently, liable to all the consequences of it; that the sufficiency of the reasons on which the judgment was rendered, and the Opposant's right to it, and the validity of the judgment itself, were *choses jugées*, and could not be questioned by an incidental proceeding such as a contestation to an opposition founded upon that judgment; that, once a judgment *en séparation de biens* was rendered and duly executed there was but one mode by which it could be destroyed, and that was by consent of the parties in putting their effects together again, *en remettant leurs biens ensemble.* (1)

IRVINE, for Plaintiff, observed that, while he did not admit the first count of his plea to be demurrable, be contended that his plea could not be separated or divided into parts; that it must either be demurred to in the whole, or not at all; that any particular portion or paragraph of it, could not be selected and demurred to, while the remainder of his plea was admitted to be good.

POPE, RICHARD in reply, remarked, that there was no principle of law better established, than that one or more counts in a declaration or plea could be demurred to, notwithstanding that the remaining counts were good; and that the English authorities all agreed that, where a single count of a plea or declaration was bad, that count alone must be demurred to

(1) Guyot, *Répertoire*, vbo Séparation de biens, p. 220; Pothier, *Traité de la communauté*, n° 523.

and that, if the whole of a plea is demurred to, while only a count of it is bad, the demurrer in such case will be dismissed; moreover, that the practice of our own courts had constantly been to recognise the right to demur to a single count of a plea or declaration. (1)

BOWEN, Chief-Justice: The demurrer must be maintained. The Plaintiff has called in question, by the first count of his plea, the validity of a judgment of this court, and the reasons or grounds upon which it is founded, this cannot be done; the judgment *en séparation de biens* obtained by Opposant and duly executed, cannot now be set aside by the court, and, therefore, its validity cannot be called in question by a plea in bar to an opposition founded upon that judgment. As to the objection that a single count of the plea cannot be demurred to, it is untenable, as the courts here have already decided that a separate count of a plea or declaration can be demurred to, notwithstanding that the remaining portion of the plea may be perfectly good. Demurrer maintained. (10 *D. T. B. C.*, p. 206.)

HOLT and IRWINE, for Plaintiff.

POPE, RICHARD, for Opposant.

CAUTIONNEMENT POUR FRAIS.

CIRCUIT COURT, Quebec, 23th May, 1860

Before STUART, Assistant-Judge.

GAGNON *vs.* WOOLLEY.

Jugé: Que quoiqu'un Demandeur résidant hors la Province poursuive *in formâ pauperis*, le Défendeur a droit d'obtenir caution pour ses frais, en vertu de la 41ᵉ Geo. III, ch. 7, sec. 2. (2)

The Plaintiff, residing in Upper Canada, sued out a writ of *arrêt simple*, for the sum of £16 13, against Defendant. The Plaintiff proceeded *in formâ pauperis*. The Defendant moved upon Plaintiff to put in security for costs, under the provisions of the 41 Geo. III, cap. 7, sec. 2.

(1) 3 R. J. R. Q., p. 114.

(2) This section provides; "That in all actions, oppositions and suits prosecuted before the courts of civil jurisdiction in this province, by any person "or persons, residing without the Province, whether such person or persons "be subjects of His Majesty or not, the Defendant, or Defendants or other "concerned may, demand and obtain good and sufficient security, at the discretion of the said court, for payment of their costs, in case the Plaintiffs or "prosecutors should fail in such their said actions, oppositions or other suits; "and all proceedings shall be staid and suspended, until such security shall "have been offered and received." V. art. 29, C. C.

DECHÈNE, for Plaintiff, contended that, where a Plaintiff proceeded *in formâ pauperis*, he did not come within the provisions of the above statute; that it never was the intention of the legislature that suitors proceeding *in formâ pauperis* should come within its provisions; that it would amount to an absolute denial of justice to insist upon strangers, who were without means, finding security, as it would be almost as difficult, in most cases, for them to find security in a place were they were not known, as it would be to obtain the money necessary to enable them to prosecute their claim, while the object of the law in allowing such persons to sue *in formâ pauperis* was to relieve them from any such necessity.

IRVINE, for Defendant, maintained that the provisions of the statute in question made no exception, and that Defendant was therefore entitled to security.

STUART, Ass.-Judge: Suitors proceeding *in formâ pauperis* are entitled to the services of the immediate officers of the court without charge, but the costs for which security is demanded by Defendant in any cause, are not costs due to the officers of the court for papers or services, but are costs due, or to become due to Defendant; and the provisions of the statute cited at the argument do not, nor does any other statute that I am aware of, make any exception in this particular with respect to parties who proceed *in formâ pauperis*, the motion must therefore be granted, and Plaintiff must put in security for costs. (10 *D. T. B. C.*, p. 234.)

PLAMONDON and DECHÈNE, for Plaintiff.

HOLT and IRVINE, for Defendant.

NOVATION.—BILLET PROMISSOIRE.

SUPERIOR COURT, Montreal, 30th April, 1860.

Before BERTHELOT, Assistant-Judge.

BEAUDRY *vs.* PROULX.

Dans une action sur une obligation, le Défendeur plaida qu'il avait donné au Demandeur deux billets promissoires, pour £60 chaque, en déduction du montant dû, et qu'il les avait payés, et aussi, un autre billet pour £60 qui était encore en la possession du Demandeur. Le Demandeur répondit que le montant des deux premiers billets avait été perçu, et que les deux derniers avaient été donnés sur convention que le Défendeur paierait 12 pour cent d'intérêt sur l'obligation. Le Défendeur, interrogé sur faits et articles, admit qu'il s'était engagé à payer 12 pour cent d'intérêt, ajoutant qu'il avait été contraint de le faire en raison de son incapacité de payer le capital à son échéance.

Jugé : Que le montant du second billlet devait être déduit du montant du principal et de l'intérêt à 6 pour cent, et que le troisième billet n'opérait pas novation et devait être rendu au Défendeur. (1)

(1) V. art. 1169 C. C.

The Plaintiff's action was brought to recover £432 7 3, amount of a notarial obligation, dated the 24th March 1853, made by Defendant in favor of J. L. Beaudry & Co., also £72 9 5, interest from the 4th March, 1857, in all £504 16 8, the other partner in the firm having transferred his rights in the copartnership to Plaintiff. The Defendant pleaded that judgment could only be rendered against him for £401 1 9, inasmuch as, on the 15th August, 1855, he gave Plaintiff his note for £60, to pay the interest accrued to the 4th March, 1856, which note he had paid, and. on the 26th October, 1857, gave Plaintiff another note for £60, at one month, which he also paid, and, thereby, reduced the obligation and interest to £413 8 3, making with interest added to 16th March, 1858, the sum £421 13 9. That on the last mentioned day, he gave Plaintiff another note for £60, at three months, which Plaintiff still held, thereby reducing the sum due at the said date to £361 13 9, which, with interest to the date of action, amounted to the sum of £401 1 9 above referred to. The Plaintiff, by his answer to the plea, admitted that the note first mentioned had been recovered and paid, thereby discharging the interest to the 4th March, 1856, that the second note, which was paid, and the third note, which was unpaid and tendered back to Defendant, were given under a special agreement that interest was to be paid at 12 per cent. Plaintiff agreeing to give a year's delay for the payment of principal, and that the sum demanded was therefore due. Replication as to the 12 per cent., that, even if the agreement was made, it was usurious and void. (1) The Defendant admitted that the two last notes of £60 had been given for interest, which he agreed to pay at 12 per cent., because he was forced to do so, not being able then to pay the capital. By the judgment, it was declared that the second note of £60 " must be held to apply on the obligation, from the time the " note felle due, and to reduce the obligation by so much, and " that the last note of £60 was not shewn to have been so " taken as to operate *novation*." It was, therefore, ordered to be returned to Defendant, and judgment rendered for £415 14, with interest from 26th November, 1857. (10 *D. T. B. C.*, p. 236.

Roy and Bruneau, for Plaintiff.

Drummond and Bélanger, for Defendant.

(1) V. S. R. C. de 1886, ch. 127, s. 1.

CAUTIONNEMENT JUDICIAIRE.

SUPERIOR COURT, Montreal, 30th April, 1860.

Before SMITH, J.

SMITH *vs.* EGAN et al.

Avis fut donné le 15, que cautionnement en appel serait fourni le 17, un autre avis fut donné que ce même cautionnement serait fourni le 18, néanmoins le cautionnement fut donné en vertu du premier avis; le premier avis et le cautionnement fourni en vertu de ce premier avis se trouvèrent insuffisants, le premier avis ayant éte annulé au moyen du second.

Jugé: Qu'une action ne pouvait être portée contre les cautions sur un cautionnement déclaré nul en appel, pour les causes ci-dessus énoncées. (1)

On the 4th May, 1858, Plaintiff obtained judgment against one Sullivan, in an action on a notarial lease, by which judgment the lease was annulled, and Defendant condemned to pay £150, for rent accrued. On the 17th May, 1858, Defendants in the cause entered into the usual bond in appeal "that said "Maurice Sullivan shall effectually prosecute the appeal of "the judgment, and pay such condemnation money, costs and "damages, as shall be adjudged, in case the judgment of the "the Superior Court be affirmed; and, in case, Sullivan do "not prosecute with effect the appeal, or do not pay such condemnation money, costs and damages, as shall be adjudged, "in case the judgment of the Superior Ceurt be affirmed, that "John Egan and Daniel C. shall pay the same." The Plaintiff's declaration set up the proceedings in the Superior Court; the making of the bond, and the dismissal of the appeal; and prayed a condemnation against the bail for £179 5, being the amount of the judgment below, including costs, subsequent costs and costs in appeal. The plea was to the effect that the bond was entered into on the 17th May, on a notice given on the 15th, and that, by a judgment in appeal, of the 8th June, 1858, the notice, and bail bond were declared insufficient and irregular, and the appeal dismissed, the first notice being held to have been abandoned by the subsequent notice that security would be put in on the 18 of May, and that, therefore, the action could not be maintained. The Plaintiff answered, that the sureties having entered into the bond, and having prevented Plaintiff from executing his judgment, were bound to pay the amound sued for, Sullivan having failed to prosecute his appeal with effect, and the sureties not having been released from their liability. Admissions were given by Plain-

(1) V. art. 1121 C. P. C.

tiff that security was put in on the 17th, under the notice of the 15th May, as mentioned in the judgment in appeal. (1) Action dismissed. (10 *D. T. B. C.*, p. 238.)

LAFLAMME, R. and G., for Plaintiff.

DAY and DAY, for Defendants.

CAPIAS.—AFFIDAVIT.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 9th June, 1860.

Before Sir L. H. LAFONTAINE, Bart. C.-J., AYLWIN, DUVAL, MONDELET, Justices, BRUNEAU, Judge *ad hoc.*

BLANCKENSEE, Appellant, and SHARPLEY, Respondent.

Le Demandeur, dans un affidavit pour *capias*, donna pour raison de sa croyance "qu'il a été ce jour informé par A. et B. que le Défendeur a empaqueté tous ses effets pour s'en aller du Canada, et qu'il laissera la dite Province demain, et n'y reviendra pas, et qu'il entend ainsi laisser la Province avec l'intention frauduleuse susdite." Sur requête, par le Défendeur, pour être élargi et mis en liberté, les deux individus A. et B. examinés de sa part, déposèrent qu'ils avaient seulement dit que le Défendeur était sur le point de partir pour New-York. En transquestionnant les témoins du Requérant, le Demandeur fit preuve d'autres faits tendant à démontrer l'intention frauduleuse du Défendeur.

Jugé: 1. Que telle preuve peut être faite et que le Demandeur n'est pas restraint aux matières de faits énoncées en son affidavit

2. Que, dans l'espèce, quoique l'affidavit fût directement contredit par les deux individus desquels le Demandeur avait déclaré qu'il avait reçu son information, néanmoins, il y avait suffisamment sur le record pour démontrer que le Défendeur était sur le point de laisser la Province frauduleusement. (2)

On the 10th of January, 1859, Appellant was arrested under a writ of *capias ad respondendum*, sued out by Respondent, on an affidavit that Defendant was about to leave the Province with faudulent intent, setting up the following, as the reasons of his belief: "That deponent was, this day, informed by Mar-"cus Ollendorff, clerk, and William Bishop, storeman, both of "the city of Moutreal, that Isaac Blanckensee has all his

(1) Judgment in appeal: La Cour après avoir entendu les parties sur la motion faite par l'Intimé, le premier jour de juin courant, que l'avis donné par l'Appelant, le 15 mai dernier, pour lundi matin, à neuf heures, le 17 du même mois, et annexé au writ d'appel, soit déclaré irrégulier et insuffisant et contraire à la loi, et que le cautionnement par le dit Appelant, sur tel avis, soit déclaré irrégulier, insuffisant et irrégulièrement produit, et qu'en conséquence l'appel soit renvoyé avec dépens. Considérant que le dit avis sur lequel le cautionnement de l'Appelant a été ainsi donné avait été abandonné par le dit Appelant, et était sans effet, et censé mis au néant, par un avis subséquent donné par le dit Appelant informant le dit Intimé que le dit Appelant produirait les mêmes cautions le mardi 18 du dit mois de mai : en conséquence, déclare le dit cautionnement irrégulier et insuffisant, et déboute l'appel interjeté en cette cause, avec dépens contre l'Appelant en faveur du dit Intimé, &c."

(2) V. art. 819 C. P. C.

"trunks packed for a start from Canada, and that he will "leave the Province to-morrow, and will not return again, and "that he so intends leaving with the fraudulent intent afore- "said." The Appellant filed a petition for his discharge, in virtue of the provincial statute, 12 Vict., ch. 42, setting forth that the allegations of the affidavit made by Respondent were false and untrue, and that he was not about to leave the province of Canada with fraudulent intent, and that there was not sufficient reason for the alleged belief of Repondent expressed in the affidavit to that effect. The persons referred to in the affidavit, Ollendorff and Bishop, were examined on behalf of Petitioner. The following extracts from the examination in chief will shew to what extent they contradicted the affidavit of Plaintiff. Ollendorff, says: "In the early part "of January last, I think it was on Monday morning, I com- "municated something to Plaintiff respecting Defendant. I "was talking to Plaintiff in his room, and I told him that "Defendant was going to New-York. That is all I told him. "I never told Plaintiff any thing else concerning Defendant, "either that he was or was not going to return to Montreal. "That is all I know about the matter. I never, upon any "other occasion, spoke to Plaintiff concerning Defendant." William Bishop: "The Plaintiff sent me down to Mrs. Romaine's "boarding house, where Defendant boarded, to ascertain if "Defendant was stopping there, and if he was not going "away. Mrs. Romaine said Defendant was stopping there, "and that he was leaving the following morning for New- "York. When she said so, she said she did not wish her name "published to any one but Plaintiff. I then returned to the "store, and told Plaintiff what she had said. When I delivered "this to Plaintiff he told me to tell the same to Mr. Devlin, "his attorney, which I did. This is the only communication I "made to Plaintiff or his attorney about the matter, and it is "all I know about the matter." The judgment in the Superior Court, rendered on the 11th of March, 1859, BADGLEY, Justice, dismissed the petition. The Appellant contended: 1. That there were not of record sufficient reasons for the belief that Defendant was immediately about to leave the Province with fraudulent intent, as mentioned in the second section of the act, that belief being alleged to be founded upon the statement of two persons who declare they never made such statement; 2. That if Plaintiff had grounds for his belief other than those alleged, he should have stated them clearly, in order that Defendant might have an opportunity of testing their truth, but had failed to do so. The Respondent contended that Ollendorff and Bishop's statements sustained the main point that Defendant was about to leave for New-York, and that he was not

to be restricted to the literal and precise allegations of the affidavit, but could produce other testimony to shew the fraudulent intent of Defendant, and had done so from Petitioner's own witnesses sufficiently to warrant the judgment of the court below.

MONDELET, J., in expressing his dissent, said : " It is proper first to consider the law which is to rule this case, in order with certainty to apply it to the facts. The statute 12th Vict., cap. 42, has the following (2nd) section : amongst other things, it enacts that " it shall be lawful for the court, or any judge of the court whence any process shall have issued to arrest any person, either in term or vacation, to order any such person to be discharged out of custody, if it shall be made to appear to him, on summary petition and satisfactory proof, that there was not sufficient reason for the belief that Defendant was immediately about to leave the Province with fraudulent intent." The statute above quoted was passed to prevent frivolous and vexatious arrests. The reasons or causes of belief must be disclosed, in order that the course thus taken by any party, on the strength of the information he has obtained and which he is bound to disclose, may fairly be tested. I may at once add, that it is evident that the reasons assigned by the party making the affidavit are the only ones which, on the petition for release, are to be taken into consideration, otherwise any one could hazard an arrest, and when brought to account, would travel all over town, or anywhere else, to discover evidence of presumption which he knew nothing of at the time he made the affidavit. Moreover, he would secure himself from a prosecution for perjury, inasmuch as he would, of course, rely upon the fact that he never swore to the existence of facts justifying such presumptions. Assuming the above to be law, it suffices just to read the evidence a considerable part whereof is, in my opinion, altogether irrelevant, to come to the conclusion that Sharply has either vexatiously caused a *capias ad respondendum* to issue against Appellant, or that he has misconceived what was told him by Samuel (erroneously called Marcus) Ollendorf and William Bishop. They merely told Sharply that Blackensee was to leave for New-York. I must say that it is singular enough that those two witnesses should have taken the trouble to convey such information to Sharply, and it is not the less remarkable that Mrs. Romaine expressed her wish that no one but Sharply should be made acquainted with her saying that Blackensee was to leave next morning for New-York. But, independent of such circumstances being of no great weight, it must be borne in mind that we have nothing *legally* and *judicially* to do with such considerations, which are not those Sharply grounded his belief on. I need

hardly add that the other circumstances disclosed in the course of the evidence are to be treated in the same way, and that the judges should not allow their decisions to be in the least influenced by them, either for or against Plaintiff or Defendant. It is all important for each member of the community, and society at large, that none but well grounded arrest for debts should take place. The liberty of the subject is so sacred that whoever, without just cause, interferes therewith should not do so with impunity. I think the petition, instead of being dismissed, should have been maintained, and Defendant discharged. I therefore opine for the reversal of the judgment of the Superior Court."

BRUNEAU, Judge *ad hoc*, held that there were facts of record which sufficiently shewed the fraudulent intent. The parties had contradicted what Plaintiff had said in his affidavit, but there were other facts brought out by the evidence for Defendant. He had left for New-York, his shop was shut up, and there was evidence that before leaving, certain trunks were deposited with Moss. Parties did not like to be supposed to give information to a creditor, but why did they, in this case, go to Plaintiff, why say that Defendant was going to leave? The Plaintiff had reason to take the alarm, and in most cases the memory of a creditor would be quite as good, in relation to what was told him about his debtor, as that of the parties from whom he got his information. In commercial matters, some latitude must be given, notwithstanding the liniency now shewn by recent legislation in doing away with imprisonment for debt.

The Chief Justice : I do not concur in the judgment to be rendered by this court.

Judgment confirmed. (10 *D. T. B. C.*, p. 240, et 6 *J.*, p. 288.)

BLEAKLEY, for Appellant.

DEVLIN, for Respondent.

FAITS ET ARTICLES.—VIVA VOCE.

COUR SUPÉRIEURE, Montréal, 28 mai 1859.

Coram C. MONDELET, J.

LAWRENCE MOSS *vs.* WILLIAM DOUGLASS et al.

Jugé : Qu'une partie assignée à répondre *vivâ voce* à des faits et articles, ne peut consulter des notes écrites que pour citer des dates ou des chiffres, et doit être empêchée de voir ces notes pour tout autre objet.

Motion de la part du Demandeur qu'il lui soit permis de répondre *de novo* à quelques-uns des interrogatoires sur faits

et articles à lui soumis le 4 mai 1859, et de substituer aux réponses qu'il a faites ce jour-là, d'autres réponses contenues dans la motion ; cette motion est appuyée d'un affidavit du Demandeur, dans lequel il allègue qu'en conséquence des discussions fréquentes, qui avaient lieu à l'enquête, entre les avocats dans la cause, des conversations qui avaient lieu entre les spectateurs et du bruit qui se faisait dans l'appartement, par suite des enquêtes faites dans d'autres causes, le Demandeur était devenu confus et embarrassé, et son attention avait été distraite ; que la confusion dans laquelle il avait été ainsi jeté l'a empêché de comprendre les interrogatoires auxquels il demande à répondre de nouveau, que, par suite des interruptions fréquentes de l'avocat des Défendeurs, ayant pour objet d'empêcher le déposant de consulter un projet de réponses qu'il avait apporté avec lui, il a été rendu incapable de recueillir ses idées et de répondre pertinemment aux interrogatoires en question, que le déposant a reçu la permission de l'honorable juge président à l'enquête, l'hon. C. Mondelet, de référer aux réponses qu'il avait préparées, pour rafraîchir sa mémoire, mais seulement quant aux chiffres et aux dates, et que, quand il les consultait, même pour cela, il était constamment troublé par l'avocat des Défendeurs, qui l'empêchait effectivement de le faire ; que, vu ces raisons, il demande à substituer aux réponses faites celles contenues dans l'affidavit et la motion. Motion rejetée avec dépens. (1) 8 *J.*, p. 92.)

JOHN BLEAKLEY, pour le Demandeur.

R. and G. LAFLAMME, pour les Défendeurs.

FAITS ET ARTICLES.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 9th June, 1860.

Before Sir L. H. LAFONTAINE, Baronet., C.-J., AYLWIN, DUVAL, MONDELET, Justices, BADGLEY, Judge *ad hoc*.

MOSS, Appellant, *and* DOUGLAS et al., Respondents.

Jugé en Cour Supérieure : Qu'il ne sera pas permis à un Demandeur de produire de nouvelles réponses à des interrogatoires sur faits et articles, sur un affidavit par lui fait, qu'en raison des arguments de conseil et de la confusion qu'il y avait en cour à l'enquête, où ses réponses furent prises *vivâ voce*, il devint embarrassé ; et que l'action sera renvoyée sur les réponses faites, nul témoin n'ayant été examiné.

En Appel : Que le dossier sera renvoyé au tribunal inférieur pour y être procédé ultérieurement à l'enquête, chaque partie payant ses frais en appel.

The action in the court below was brought upon a promissory note, dated the 2nd April, 1855, at three months, for

(1) Vide 8 *R. J. R. Q.*, p. 131, *Coleman* vs. *Fairbairn*.

£87 2 6, made by William Douglas, one of Defendants, payable to an indorsed by the other Defendants. The plea was to the effect, that, when the note was presented for payment, Defendants gave Plaintiff a renewal note for the same amount, which was also renewed up to the 27thA pril, 1857, when it was paid, and all unsettled transactions closed.

The only evidence of record consisted of Plaintiff's answers to interrogatories *sur faits et articles*. These answers were confused and contradictory, and Plaintiff moved to be permitted to produce other corrected answers, to the 6, 7, 8, 9, 10 and 13 interrogatories, which answers were produced with the motion. An affidavit of Plaintiff was filed in support of this motion, setting up, in effect, that his answers were taken *vivâ voce*, in open court, that from the frequent arguments of counsel, on both sides, of deponent, touching his examination, and from the conversation of the by-standers and other disturbances consequent on the *enquêtes* then going on, he became confused and perplexed and was prevented from looking at the sketch of his answers. This motion was rejected, and, on the 30th June, 1859, the Court (Monk, Justice), rendered a judgment, dismissing the Plaintiff's action: "Considering "that it appears from the answers of Plaintiff to interrogato-"ries *sur faits et articles* that the promissory note dated, &c. "On which this action rests, was renewed, paid or satisfied by "a renewal thereof, in manner and form, and at the time set "forth in the plea firstly pleaded." In appeal, MONDELET differed as to the costs, which he thought should have been allowed to Appellant, because he had succeeded on his appeal.

Chief-Justice: I was disposed to confirm the judgment of the court below.

Judgment in appeal: "Seeing that Appellant's action is brought upon the promissory note declared upon, the signatures whereof are admitted by Respondents; seeing that Respondents were bound to prove their plea of payment, as by them set up, and that the only evidence in support of their defence is to be found in the answers of Appellant to the interrogatories *sur faits et articles* submitted to him by Respondents; seeing that said defence has not been sustained by proof, and that, in the award of judgment in favor of Respondents, there has been error; seeing, however, that justice requires that the parties Appellant and Respondents should be permitted to adduce further evidence respectively upon the motens in issue between them. It is considered and adjudged by this court that the judgment rendered by the Superior Court of Montreal, on the 30th June, 1859, be and the same is hereby reversed; and it is further considered and adjudged that the record be remitted to the Superior Court, to the intent that the *enquête* be reopened, and that the parties respectively be en-

abled to proceed to the adduction of evidence, and to take such further proceedings in the Superior Court as they may be advised, and as to law and justice may appertain, and lastly it is ordered that each party do bear his own costs incurred here in appeal." (10 *D. T. B. C.*, p. 248.)

BLEAKLEY, for Appellant.

R. and G. LAFLAMME, for Respondents.

NAVIGATION.—COLLISION.—RESPONSABILITE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 4th June, 1860.

Before Sir L. H. LAFONTAINE, Bart., Chief Justice, AYLWIN, DUVAL and MONDELET, Justices.

THE HARBOUR COMMISSIONERS OF MONTREAL, Appellants, and GRANGE, Respondent.

Jugé : 1. Dans une action contre le capitaine d'un vapeur d'outre-mer, en dommages résultant d'une collision du vapeur avec un quai, les dommages en question avaient été causés par la négligence et la maladresse de l'Intimé et de son équipage.

2. Que, généralement, le capitaine, en vertu du droit maritime, comme l'agent *institor* et préposé des propriétaires, est responsable, et que, par la 20e sec. de la 18e Vic., ch. 143, il est, aussi bien que tous autres capitaines de vaisseaux, responsable envers les Appelants pour dommages causés aux quais confiés à leurs soins.

3. Que le quai n'étant pas en bon ordre, la règle de deux tiers de neuf pour du vieux, peut être considéré comme devant guider la discrétion de la cour en accordant des dommages.

The action was brought against the master of the *North American*, one of the ocean steamers, to recover £62 10s., the amount of damage occasioned by the steamer having struck against the Island wharf, in the harbour of Montreal, Plaintiffs having themselves expended the amount sought to be recovered in repairing the wharf, after the damage done by the collision. The Defendant pleaded: *first*, that, during the whole trip, from Quebec to Montreal, and, at the time of the collision, Defendant had on board a branch pilot," as, by law and the " statutes in such case made and provided, he was bound to " have, who, at the time of the accident, had the sole charge, " order and control of the steamer, and such branch pilot had, " at the time of the collision, the command, control and direc- " tion of the steamer, and the working, steaming and naviga- " tion thereof, and, by means of the premises, Defendant was, " at the time of such pretended collision, under no liability " whatever, for and in respect of the working and navigation " of the vessel, either towards Plaintiffs or any other person or " body politic; and if, during the time said steamer was so under " the control of such branch pilot, said vessel struck against

" and caused damage to Plaintiffs' wharf, he Defendant is in " no way legally bound to pay therefor, or indemnify Plain- " tiffs against any such loss and damage." The *second* plea set up that Plaintiffs were bound and obliged, by law, to keep the channel leading into the port free and open for the passage of vessels, but failed to keep the channel safe and navigable, and that, at the time in question," said channel was, as De- " fendant afterwards ascertained, obstructed, intricate and " dangerous for the passage of vessels; that, if any injury " was done to the wharf, the same was attributable to the " neglect and fault of Plaintiffs, in not keeping the channel " sufficiently dredged and open for the passage of vessels." The *third* plea set up that the wharf projected into the stream; that every precaution was taken to avoid collision," but, " owing to the violence and force of the current, and the " power of the wind assisting, said steamer was driven by " the force and oblique direction of the stream, on and against " said Island wharf, and, if any damage was done to the wharf, " which Defendant expressly denies, it was not through any " fault of Defendant, his officers or crew, but owing partly " to the projection of the wharf so far into the river St. " Lawrence, and partly to the irresistible violence of the " current bearing on and against the wharf, and the power of " the wind assisting, and the same was the effect of, and was " occasioned by, a *force majeure*, for which Defendant was " not and cannot be held responsible." On the 25th September, 1858, the judgment of the court, SMITH, Justice, dismissed Plaintiff's action: " Considering that Defendant hath fully " proved that, at the time of the accident complained of, the " ship or steamer *North American*, whereof Defendant was " master, was under the exclusive care and charge of a licensed " branch pilot, as provided by the statute in force in this " province, and was, at the time navigated by the branch " pilot, by reason of which the whole power and control " over the ship or steamer was in the branch pilot, and " not in Defendant, and to the exclusion of Defendant (1); " and, further, considering that Plaintiff hath not proved that " the collision or accident complained of Plaintiff was caused " by any act or thing by reason of which Defendant could be " by law held liable or responsible, or by reason of which the " pilot in charge could have been exonerated, the court doth " maintain the exception firstly pleaded, and doth dismiss the " action." In rendering judgment, the honorable judge stated, that the *second* and *third* pleas were manifestly not proved, but made no allusion to the section of the harbour act

(1) V. *S. R. C.* de 1886, ch. 80, sec. 57.

above referred to and quoted below, nor was any opinion expressed as to whether the imperial pilotage acts were, or were not, in force in Lower Canada, nor was any provincial statute referred to as establishing compulsory pilotage. On behalf of Appellants, the following points were urged: 1. That by our provincial statutes, pilotage is not compulsory for vessels navigating that part of the St. Lawrence between the port of Quebec and the city of Montreal. 2. That the imperial legislation respecting pilotage, was never in force in Canada. (1) But, even if such imperial legislation were in force in Lower Canada, yet Respondent was liable. 3. Because the plea only alleged that a branch pilot was on board and in charge of the steamer, which was not sufficient, without *alleging and proving that the damage was occasioned by the fault or incapacity of the pilot*, and that the *first* exception, as maintained by the judgment, was, therefore, unfounded in law. 4. That responsibility is directly thrown upon the master, by the Montreal harbour act of 1855, 18 Vict., cap. 143, sec. 20, which enacts: " If any injury shall be done to any of the " wharves, piers or other works in the said harbour, cons- " tructed or to be constructed, by any vessel, or by the care- " lessness or wantonness of the crew thereof, while in the " execution of their duty or the orders of their superior " officers, it shall be lawful for the said corporation to seize " such vessel and detain her until the injury so done shall have " been repaired by the master or crew, or until security shall " have been given by the said master, to pay such amount " for the injury and costs as may be awarded in any suit " which may be brought against him for the same, *and he is " hereby declared to be liable to the said corporation for any " such injury*." (2)

AYLWIN, Justice, held that the first plea was unfounded in law. It went upon the ground that there could in no case be any liability, if the ship was in charge of a licensed pilot. The highest authority, that of Dr. Black, whose accuracy and ability are admitted by all, was against such a doctrine, as would be found on reference to the case of " The Lord John Russell," Stuart's Vice-Admiralty Reports, p. 190. The second plea was of a most extraordinary character. It amounted to this, that the corporation, Appellants in the case, were bound to remove all the natural difficuties in the navigation, and make it fit for vessels of any amount of tonnage, and that vessels which come into the harbor and cause damage to the property under

(1) See 6 Geo. IV, cap. 125; Merchant shipping act of 1854, *first* clause of part *fifth*; Stuart's *Vice-Admiralty Reports*, p. 195.

(2) See also 20 Vict., ch. 126, sect. 10.

charge of the corporation shall not be held responsible, because the channel was not suited to vessels of such large draught. As if the harbour commissioners had enticed or forced the vessel to come to the harbour of Montreal. The evidence shewed the collision was the result of negligence and carelessness; there was no foundation for the plea of *force majeure*. The day was fine, without wind, the collision took place in day light, and the fact, shewn in evidence, that vessels of this size had always previously gone past the wharf in question to their berth in the Queen's dock without difficulty or collision, clearly indicated that the stamer in question with proper care, might have reached her berth, without doing the damage complained of.

DUVAL, Justice, dissented from the judgment, on the ground that he thought it established that the wharf projected too much into the stream, and that the channel was narrow and shallow. If the harbour commissioners had dredged the channel before the collision, as much as it would appear that they had done since the collision might have been avoided.

JUDGMENT: Seeing that Marcel Mathieu, a witness examined by Respondent, is the branch pilot who is alleged in the first exception pleaded by him to have had the sole charge, order and control of the steamship *North American* whereof Respondent was and is master, at the time of the collision in respect whereof the present suit is brought, was not an admissible or competent witness on the part of the Respondent or of the ship.

Seeing that his testimony was duly objected to by Appellants at the time of his examination, and that the same was taken subject to such objection, the decision of which was reserved till after final hearing, and that his deposition being the only testimony in the cause, in relation to the employment of a branch pilot or of what occurred on board of the said vessel at the time of the collision, must impliedly have been received by the court below as admissible, in which there is error. It is considered and adjudged that the deposition of said Mathieu be, and the same hereby is rejected and struck from the files, and held and taken for naught.

And seeing, therefore, that no legal evidence has been adduced to support the said first plea, even upon the supposition that the same was to be held sufficient in law, the same is hereby dismissed and the said exception overruled.

Seeing that Respondent hath wholly failed to establish in proof the second and third exceptions by him pleaded, and that the same ought therefore to have been overruled and dismissed.

Seeing that Appellants have proved that, on the 25th day

of October, 1856, the weather being fine, in the day time, the channel being clear and unobstructed the steamship *North American*, whereof Respondent was the master, having neared the red buoy, below the Island wharf, in the harbour of Montreal commenced sheering, and above the buoy took a sheer towards the wharf of Appellants, that the channel of the river after passing the buoy is perfectly straight, that one of the ship's anchors was hanging over the ship's bow, ready to be dropped, that the vessel was under steam on her way to her usual berth, in the dock called the Queen's dock, in the harbour of Montreal, that, on nearing the wharf, the jib-boom of the steamship came in contact, and knocked down the lower light house, situate on the wharf, and that then the anchor hanging over the bow caught hold of the piles of the wharf and tore them up with violence, that the *Iron Duke*, another steamer lying at the wharf, was obliged to leave her berth and to steam away, without which she would have been run into and crushed by the *North American;* that if the anchor had not been hanging at the bow, and had not caught the wharf, no damage by lateral pressure would have occurred.

Seeing that Respondent has in no manner attempted to show what management was had on board of the steamship, what orders were given, if any, and by whom, if the orders were obeyed or not, or to account for the manner in which the vessel was so run into and against the wharf. Seeing that Respondent has wholly failed to establish that the wharf in question projected unduly, or that the collision was occasioned by such projection, but that, on the contrary, it appears that, both before and since the collision, the steamship in question, and others belonging to the same owners, have, in safety, reached their usual berthing, in the Queen's dock, in the harbour.

Seeing that the damage complained of was the act of the ship, and was caused by the negligence and misconduct of Respondent, and the default of the master and of the crew of the ship.

Seeing further that, in general, under the maritime law, Respondent, as the agent, institor and *préposé* of the owners is liable, as also by the terms of the provincial statute of Canada of the 18th Vict., cap. 143, sect., 20, he, together with all other ship masters, is expressly and in particular declared to be liable to the corporation now Appellant in this cause for injury done to the wharf by the vessel.

Seeing that, although the damage done to the wharf by the steamship required an outlay of £62 10 2 to be repaired, yet that it appears by the proof that the same was not in good order and condition when the damage complained of was

done, and that, in estimating the amount to be awarded to Appellants, regard may be had to the rule of two thirds new for old, as a guide to the exercise of the discretion which the court is called upon to use in this behalf, and that in applying this rule the amount of damage which Appellants might claim justly would be reduced to the sum of £41 1 6.

Seeing that, therefore, in the judgment of the court below, by which the action of Appellants has been dismissed, there is error. It is considered and adjudged, that the judgment rendered in the Superior Court, at Montreal, on the 28th September, 1858, be, and the same hereby is reversed, and, proceeding to render the judgment which the court below ought to have rendered, it is further considered and adjudged that Respondent do pay to Appellants, as and for damages done to their wharf by the steamship or vessel, whereof Respondent was master, by the collision complained of in and by Appellant's declaration, the last mentioned sum of £41 1 6, together with interest thereon from this day, and all costs as well in the court below as in the court here. (9 *D. T. B. C.*, p. 3, et 10 *D. T. B. C.*, p. 259.)

A. and W. Robertson, for Appellants.

Rose and Ritchie, for Respondents.

Another case, The Harbour Commissioners of Montreal vs. MacMaster, was decided on substantially the same grounds, the same day. The pleadings were alike in both cases, and the following extract from the judgment will sufficiently shew the points of difference in the facts connected with the collision. In appeal. 4th June, 1860—Sir L. H. LaFontaine, Bart., Chief-Justice, Aylwin, Duval and Mondelet, Justices. Judgment: "Seeing that by the testimony of Robert Borland, master mariner and captain of the steamship *Anglo-Saxon*, a witness produced by Respondent, that he was chief mate on board of the ship or vessel, on the twelfth day of August, eighteen hundred and fifty-six, when the damage by collision complained of by Appellants took place in the harbour of Montreal, and that the accident was occasioned by the intricacy of the channel and the current striking the vessel on the port bow, while the ship was going at half speed, that the port anchor was let go to check her bow fair into the channel, when the chain parted at twenty fathoms, that, at that point, there was about sixteen feet of water, that, in consequence of the force of the current upon the bow and the ship being so near the bottom, she did not answer her helm, that the *Anglo-Saxon* always answered her helm, readily, under ordinary circumstances, that she was well and sufficiently manned, and the orders of the branch pilot on board were instantly obeyed, and that, when the chain broke, the steamer struck against the wharf, to wit, the certain wharf, in the harbour of Montreal, under the control and management of Appellants, in their capacity of commissioners.

Seeing that the witnesses of Respondent themselves have established that the accident (that is to say the damage done to the said wharf) was caused by his vessel being too deep, and from her taking a sheer into the wharf, although her helm was starboard and her engine reversed, and as an anchor had previously been thrown out, but that the cable provided by the owners not being sufficient for the purpose of steadying the ship and bringing her up, broke and thus rendered her unmanageable.

Seeing that, under these circumstances, the fact that there was a branch pilot on board of the said vessel, at the time of the collision complained of,

can have no influence upon the case, even upon the supposition that the plea of Respondent in this behalf, were legal and admissible.

Seeing that it is proved that, on the day in question, the weather was calm and fair, that the collision occurred in broad day light, at mid-day, that there was, at the time, one foot four inches higher water than the usual summer level.

Seeing that Respondent has wholly failed to establish that the wharf in question projected unduly, or that the collision was occasioned by such projection, but that, on the contrary, it appears that, both before and since the said collision, the steamship in question, and others belonging to the same owners, have, in safety, reached their usual berthing, in the Queen's dock, in the said harbour.

Seeing that the damage complained of was the act of the ship, and was caused by the default of the ship and the insufficiency of her tackle, apparel and furniture to wit, her cable.

It is considered and adjudged that the several exceptions set up by Respondent, and each and every of them be, and the same hereby are overruled and dismissed.

REGISTRATEUR.—RESPONSABILITE.

QUEEN'S BENCH, APPEAL SIDE, Québec, 19 juin 1860.

Before Sir L. H. LAFONTAINE, Bt., C.-J., AYLWIN, DUVAL, MONDELET, and BADGLEY, Justices.

MONTIZAMBERT, Appellant, and TALBOT DIT GERVAIS, Respondent.

Jugé : 1. Qu'un régistrateur est responsable des dommages ou de la perte causée par sa négligence d'enregistrer une hypothèque, ou par un certificat fourni par lui, dans lequel il y a une omission, en conséquence de laquelle un acquéreur de bonne foi est troublé dans sa possession. (1)

2. Que l'action en pareil cas doit être en garantie, le régistrateur étant le garant de la partie à laquelle il a causé des dommages.

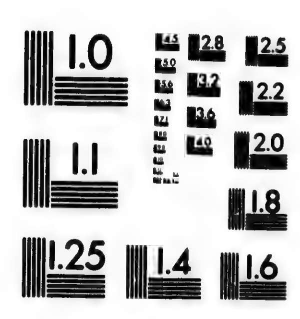
This was an appeal from a judgment rendered in the Superior Court, at Quebec, on the 1st day of April, 1859, whereby Appellant, who is the registrar of the county of Quebec, was condemned to pay to Respondent the sum of £57 19 9, for damages sustained by the latter, arising out of the alleged neglect of Appellant to register a mortgage upon a certain property which Respondent had purchased. In February, 1843, one Paquet purchased a certain property in St. John street, in the city of Quebec, In July, 1845, a judgment was rendered against him, in the Court of Queen's Bench, for the sum of £25 10, with interest and costs; and this judgment was registered in August of the same year by Dérouselle, who had obtained it by assignment, the deed of acquisition of the property above mentioned was not registered until November, 1845; and, in October, 1846, Tessier, notary, having applied to Appellant for a certificate of all mortgages registered

(1) V. art. 2159 et 2177 C. C.

against Jean Paquet, received a certificate in which reference was made to a number of mortgages, but omitting all mention of the judgment in favor of Dérouselle, which had been registered in August, 1845. In November, 1846, Prudent Talbot dit Gervais, the present Respondent, acting on the faith of the certificate purchased from Jean Paquet the property in question. In September, 1853, an hypothecary action was instituted by Dérousselle against Respondent, founded upon the mortgage created by the judgment rendered in his favour against Paquet; and, in February, 1855, a *quittance portant subrogation* was granted by Dérousselle to Respondent, for the sum of £47 0 3, being the amount of principal, interest and costs of his action against the latter. Upon these grounds, Respondent instituted his action against Appellant and obtained the judgment from which the present appeal was brought.

Holt and Irvine, for Appellant, maintained that the certificate granted by him to Respondent was not such a one as the registrar is required to give by the 49th clause of the Registry Ordinance; and that, not being in the course of his official duty, he could not be held liable for any damages occurring through an accidental error or omission in such a certificate. Admitting, however, that the registrar was actually bound to give such a certificate, it would be the duty of any person bringing an action for damages, against the registrar, based upon such certificate, to shew that the amount claimed had been paid out by him, and not by reason of any neglect or omission of his own, but because of negligence on the part of the registrar. It was but fair that the party bringing such a suit, should be made to prove the amount of his loss in an accurate manner. In the present action there was no proof of this kind. For instance, it did not appear that Dérousselle's action was ever entered in court, or that any proceedings were had after the service of the writ and declaration. Neither dit it appear that Paquet had ever been sued by Respondent as his *garant;* nor that any notice had ever been given to him by Respondent, although it did not appear that he was insolvent. And again, Respondent should not have paid Dérousselle without a judgment having been rendered or even a suit pending against him. He should moreover have taken all possible steps to enforce payment from Paquet. With regard to the amount claimed, there was, in the first place, no evidence in the hypothecary action of the amount of costs claimed by Respondent having been ever taxed, neither was there any evidence of the amount paid by Respondent for legal advice. One item of £2 was also paid as having been charged to Respondent by a notary, for drawing up a petition to His Excellency the governor general. For

IMAGE EVALUATION
TEST TARGET (MT-3)



6"



this demand Appellant certainly could not be liable. The counsel for Appellant concluded by denying the liability of the registrar in the action; stating that there was not sufficient evidence of Respondent's loss; or that, even admitting the sufficiency of the evidence, Appellant had been condemned by the court below to pay double the amount for which he was responsible.

FOURNIER and GLEASON, for Respondent, stated that it was an admitted principle of justice that he who, by his neglect or his error, caused damage, should be held liable for it. If the responsibility of the registrar had no valid existence, it would be much better to close all registry offices; it would, at least, remove a trap from the path of lenders and purchasers in good faith. (1) With regard to the pretention set up by Appellant that a notarial *acte authentique* is no legal evidence against a third person not a party to such act, it was a doctrine contradicted by all the authors who had written on the subject. (2) With regard to another allegation of Appellant, it might be stated that the insolvency of the vendor, Paquet, was both proved and admitted in the case; and, as to the amount claimed by Respondent, it was proved by the *quittance* given by Dérousselle as well as by Appellant's admission of facts.

Sir L. H. LAFONTAINE, Bt., Chief-Justice, *dissentiente:* After a careful examination of the facts of the case, it will be observed that it involves a question of great importance, affecting, as it does, the responsibility of registrars in their capacity of *conservateurs* of mortgages. The main question is, whether the party aggrieved has a right to maintain an action against the registrar for the amount of damage alleged to have been sustained. This right is clearly established by the 8th sec. of the Ordinance 4th Vic., cap. 30; and it cannot be denied that the registrar is responsible for the damages caused by his negligence, whether the loss arises out of his neglect to enregister a title, or by reason of an insufficient certificate given by him. The *conservateur* should be held personally responsible for negligence of his public functions. It is true that the action does not exist on, or arise from, a special contract or a personal cause; but it originates in the fundamental principles of law itself, and proceeds from the damage caused by the neglect of the party complained of to perform his public duties as an official of the law. With regard to the amount claimed

(1) 1 Domat, *Lois civiles*, p. 160, liv. 2, tit. 8, sec. 4, art. 1; 4th Vict., cap. 30, secs. 8, 20 and 49.

(2) 1 Pigeau, p. 226; Nouveau Denisart, vbo *Acte authentique*, p. 159; Pothier, *Traité des obligations*, p. 369, part. 4, cap. 1, sec. 4, no 738, who says: "L'acte *prouve contre un tiers rem ipsam*: c'est-à-dire que la convention qu'il "renferme est intervenue."

by Respondent, the payment of principal and costs is not attempted to be denied, nay, it is admitted by Appellant; and this admission, of course, proves his liability for the amount demanded. I, therefore, come to the conclusion that the judgment of the court below, in the present action, should be confirmed.

DUVAL, Justice, *dissentiente*: This is a question of which the main issue is the responsibility of the registrar. On this question, the old and acknowledged principle of our law is well expressed in the following words: *Tout fait quelconque de l'homme qui cause à autrui du dommage, oblige celui par la faute duquel il est arrivé à le réparer.* (1) This responsibility comprises as well acts of omission as acts of commission. No public officer can be allowed to plead his own negligence or that of his subordinates to protect himself against such an action as the present. Nor can such public officer be listened to when he pleads ingnorance or error of judgment on his part. Bertrand de Grenille well expressed the intention of the legislator when he said: *la loi ne peut balancer entre celui qui se trompe et celui qui souffre.* It is needless to refer more particularly to the writers on the subject: Troplong, Toullier, Domat, and others will be found to establish the rule beyond doubt. Indeed, the principle is recognized by all the judges of this court. The objection now made is to the sufficiency of the evidence adduced by Plaintiff. It is said the notarial acknowledgment of payment signed by Dérousselle, the creditor, is not evidence against third parties. I understand the rule of law on this subject very differently. The deed proves itself, *probat rem ipsam,* against the whole world: *le contrat de vente,* says Pothier, *Tr. des obligations,* n° 738, *prouve contre un tiers qu'il y a eu effectivement une vente.* (2) Were this not so, how could an action *en déclaration d'hypothèque* be maintained against a third party. Parol evidence would be clearly inadmissible. *Faits et articles* would be useless, as Defendant would answer, I was no party to the contract and knew nothing about it. How then could the original debt be proved? This rule of our law: that the deed proves itself against the whole world, is daily recognized and acted upon in all our courts. In thus stating my opinion on the law, I will say that there are certain items in Plaintiff's claim that cannot be allowed. The charges of the notary and some of the alleged law expenses are not proved. As to the want of notice of action to Defendant, a public officer, an objection made in the present suit, it

(1) V. art. 1053 C. C.

(2) 8 Toullier, n°s 148, 149.

is clearly without foundation. The protest filed contains such notice in the most explicit terms.

MONDELET, Justice : The action in the court below is founded merely upon a *quittance* given by Dérousselle to Respondent; and, for this reason, apart from all others, I think the judgment given in favor of the latter should be reversed. The *quittance* is no proof of a judgment against Respondent in so far as the registrar, a third party, is concerned; it establishes the fact only of the payment of a certain sum to Dérousselle. Nothing is better established than that the notarial act is proof only of the fact which has occurred in the presence of the notary. Apart from this *quittance* there is no legal proof of the action said to have been instituted by Dérousselle against Respondent; no proof that the suit was ever returned into court, and nothing whatsoever to shew that a judgment has ever been obtained. Even supposing that the judgment of the court below should be confirmed by the court now here, there are several items in Respondent's claim which would have to be struck out, such as interest, costs, amount paid to Delagrave, advocate, and to Glackmeyer, notaty public for the drawing up of a petition. Next arises the question of the responsibility of the registrar. This is a generally admitted principle : but I do not see, in this case, what connecting link there is between him and Respondent. I can easily understand how the latter who had a business transaction with Paquet may have a recourse against him, by reason and in consequence of the damages suffered by him, by reason of his being troubled in the possession of the property sold to him by Paquet. But with regard to Appellant, who never gave a certificate to Respondent, who certainly never asked him for one, I cannot see what responsibility he can be said to have incurred towards respondent. These observations appear to be founded in the principles expressed by Troplong, *Priv. et Hyp.*, t. 4, no 1001. I am of opinion, therefore, that the judgmentof the court below. in this case, be reserved.

BADGLEY, Justice : I fully concur in the opinion expressed by the Chief Justice, and Mr. Justice Duval, with regard to the incontestible responsibility of the registrar for damages which he has caused. The public functionary in undertaking the duties of an office, becomes directly responsible to those who employ him in that capacity, for losses caused by his omission, his negligence or his incapacity, in proof of which I need only refer to the registry ordinance. In looking over the facts in evidence, it will be observed that the action instituted by Dérousselle was served in February. 1853; that the registrar had notice of it in the shape of a protest, and that the action against Appellant was founded upon a *quittance* granted by

Dérousselle in the month of February, 1845. With respect to the *quittance*, of which so much has been said, it is a general principle that the *act authentiqnee* is proof of itself. The exception, as laid down by the authorities, is of course, that the *acte authentique* can only *faire foi* against a third party, when it relates to facts of which the notary is personally cognizant. and not to those which are founded on a mere *ouï-dire*. The principle of law clearly defined is that the registrar is responsible in a direct manner, for the amount of judgment, capital and costs. But it would be utterly preposterous to condemn the registrar in the amount of accumulated interest and costs, on sums other than the original amount of alleged loss and damage. For the reasons which I have briefly laid down, I concur in the judgment of the court, and, consequently, in the reversal of the judgment of the court below against Appellant.

AYLWIN, Justice : The liability of the registrar is clearly established and defined in the most unmistakeable terms by our own law. As has been truly and forcibly said, it arises from the liability of the public servant to every one of Her Majesty's subjects. There is not, there cannot be, any doubt or any question on this point, which must, in all common sense be conceded at once. In my mind, however, the question at issue before the court is whether Respondent has availed himself of his undoubted right of recourse against Appellant in a legal way, and whether he has followed it up in a proper manner in this case ? Let us examine the facts of record for an answer : When Respondent is sued by Dérousselle, he simply protests against the registrar, and then pays the amount claimed by the latter, upon a *reconaissance simple*. He does not call the registrar before the court as his *garant*, although the registrar actually was his *garant* in relation to the property in question. Why did he not proceed in this matter as he should have done ? I cannot understand why Respondent thought fit to content himself with a simple protest served upon the registrar, when he was troubled in his possession. The action of Respondent should have been one *en garantie*, and Appellant should have been called into court as the *garant formel* of the former. Had Respondent adopted this course, he would have placed Appellant in a position to resist the action of Dérousselle, if he thought fit, or of adopting any other course he might deem proper. I am of opinion that the judgment of the court below should be reversed : for although admitting, to the fullest extent, the liability of Appellant, in his public capacity, I, nevertheless, feel that Respondent should be taught to proceed in a proper manner for the recovery of what was undoubtedly an undeniable right.

Judgment of the court below reversed. (10 *D. T. B. C.*, p. 269.)

Hglt and Irvine, for Appellant.

Fournier and Gleason, for Respondent.

LOUAGE DE SERVICES.—PREUVE.

Queen's Bench, Appeal Side, Québec, 19 juin 1860.

Before Sir L. H. LaFontaine, Bart., Chief-Justice, Aylwin, Mondelet and Badgley, Justices.

Stuart, Appellant, *and* Sleeth, Respondent.

Jugé : 1. Que dans une action pour gages par un domestique contre son maître, ce dernier ne peut être examiné comme témoin pour prouver un allégué d'insubordination et de négligence de la part du domestique.

2. Que la déclaration du maître sous serment doit être restreinte à la preuve des conditions de l'engagement, et des gages payés, ou des avances faites au domestique, soit en argent ou autrement. (1)

This was an appeal from a judgment rendered by the Superior Court, at Quebec, on the 14th day of June, 1859, whereby Appellant, as Defendant in the court below, was condemned to pay Respondent the sum of fifty-five pounds, with interest and costs. The circumstances of the case were briefly these. In the month of April, 1857, Respondent who had been in the employ of Appellant, during the two preceding years, entered into a verbal agreement with the latter, whereby he engaged himself as farmer and gardener on the farm of Appellant situate at Deschambault, for the space of twelve months, Appellant agreeing to pay to Respondent sixty pounds, in consideration of his services, besides sundry perquisites of the usual nature in such cases. The Respondent continued to fulfil his duties, from the day of his engagement until the 12 day of October following, when, during an altercation which took place between them, Appellant ordered Respondent to leave the premises. The Respondent left the service of Appellant, and instituted an action against the latter for the whole of his wages during the twelve months ending in April, 1858, or during the complete period stipulated in the verbal agreement. By his plea, Appellant admitted owing Respondent a sum of £11, for his services up to the period of his dismissal, for which amount be filed a confession of judgment in favor of Respondent. The Appellant also filed a *défense au fonds en fait* to the demand, except in so far as it was admitted by the confession of judgment; and further

(1) V. art. 1669 C. C.

pleaded, by his peremptory exception, the Respondent's misconduct, neglect of duty, insolence and disrespect towards his master, further alleging that respondent had declared that he would not remain in Appellant's service, and that he had accordingly quitted the same. Interrogatories upon *faits et articles* were submitted to and answered by Appellant, by which he admitted that Respondent had been in his service, as gardener and farmer, during the year 1855-56, and a portion of 1857; that he had verbally engaged Respondent in April, 1857, for one year, to commence from that date, for the sum of sixty pounds, besides the use of a house, rent free, firewood and other perquisites. The Appellant, however, further stated that, in the month of October, of the same year, Respondent had neglected the work of the farm, and had conducted himself in an insolent manner, when reproved by Appellant, refusing, at length, to work any longer; that he, Appellant, had offered Respondent to complete his year, if he expressed his regret for past misconduct; that Respondent having refused to do this, Appellant had no other alternative but to insist on his departure. A number of witnesses were examined on behalf of both parties. The dismissal of Respondent from Appellant's service was proved by one of the witnesses, as well as by a letter which the latter had written in reply to the demand made by the Attorneys of Respondent for payment. It was also established by Respondent that he had himself worked upon Appellant's farm, besides having employed and paid ten persons for work and labor. On behalf of Appellant, several witnesses were examined to prove habits of drunkenness and negligence on the part of Respondent.

VANNOVOUS, for Appellant, contended that constructive service did not give the servant a right to sue for wages, but that the action which accrued to him in all cases was one of damage. The Respondent had, therefore, mistaken his action and should be put out of court for that part of it which exceeded the amount confessed. Had the action even been brought to recover damages for wrongful dismissal, Respondent had failed to make out a case; no tender of service having been proved or attempted to be proved. And again, Respondent, by leaving the employ without remonstrance, acquiesced in the dissolution of the contract. Taking this circumstance into consideration, with the fact, proved by one of the witnesses, that Respondent declared that he would not work for Appellant any longer, it was difficult to understand how an action for wages or damages could lie. With regard to Appellant's own evidence, it was obviously necessa-

ry to resort to it, as the master was the only person who could give a perfect account of what had taken place. (1)

LÉGARÉ and MALOUIN, for Respondents, maintained that, while the engagement of Respondent was proved by the admission of Appellant himself, in his answer to the interrogatories upon *faits et articles* served upon him, the dismissal of Respondent was proved by the letter which Appellant had written to the attorneys of the latter, in answer to their demand for the amount of wages due him, as well as by the evidence of the witness McGregor. There was no direct proof of negligence on the part of Respondent, in the evidence adduced on behalf of Appellant; and it was in order to complete the proof of his statement to that effect that the latter tendered his affidavit. Even from the affidavit in question, it was evident that the sole cause of the dismissal of Respondent was the altercation which took place between the parties in the month of October, 1857. It contained nothing, however, making known the cause or subject of the quarrel: neither did it specify the alleged insolence of which Respondent was said to have been guilty towards Appellant, nor did it mention any of the expressions said to have been used by Respondent on the occasion of the dispute which led to his dismissal. It should, moreover, be considered, in connection with the plea of drunkenness, negligence, and insolence set up by Appellant, that Respondent had been in his service for a period of two years previous to his reengagement in 1857, during which time Appellant must have had ample opportunities of becoming cognizant of the bad habits of his servant. The Respondent further contended that Appellent could not by law be admitted to prove, by his own affidavit, the cause of the dismissal of Respondent; and that the only case in which Appellant could be heard upon his *serment* was as to wages, when the engagement was verbal. The Respondent concluded by stating that even supposing the personal affirmation of Appellant was deemed legally admissible by the court, it contained no fact which could justify the conduct of Appellant towards him.

BADGLEY, Justice, *dissentiente*: The present action is one instituted by a servant against his master, for the amount of his wages, upon an alleged breach of contract. After carefully examining all the facts of the case, as they appear from the evidence of record, it would seem as if the intention of the servant was to get, if possible, a year's wages for six month's

(1) Authorities cited by the Appellant in support of the argument: Pothier, *Contrat de louage*, nos 173 and 174; Guyot, *Rép. de Jur.*, vbo *Domestique*; Troplong, *Contrat de louage*, nos 869 and 867; Merlin, *Rép. de Jur.*, vbo *Domestique*; Nouveau Denisart, vbo *Domestique*.

work. I am decidedly of opinion that the declaration on oath of the master, on the facts at issue, should be taken as legal evidence; and that, as a principle, the *serment* of the master should be allowed in all cases between master and servant. Considering all the circumstances, I am of opinion that the judgment of the court below should be reversed. In this opinion, I happen to dissent from the majority of the court.

AYLWIN, Justice, *dissentiente :* I dissent from the judgment of the court, upon the same grounds as the learned judge who has just preceded me. Looking over the evidence in the case, it will be observed that the only important witness examined by Plaintiff, has given an exceedingly partial and one-sided statement of facts, which is totally contradicted by the declaration, on oath, of Plaintiff's master. What is still more deserving of note is that the witness in question was, at one time, in the service of Appellant, and had been dismissed by him. The preference as to credibility should, clearly, be given to the sworn statement of the master; and, taking it into consideration, there cannot be a moment's doubt that his conduct was perfectly justifiable. This is also clear from the evidence adduced by the servant himself. No sooner had the altercation taken place between the latter and his master, than he leaves the premises, refusing, in express terms, to work for him any longer. His conduct, in this respect, is in direct violation of the maxim that a stated number of days should be permitted to elapse by the domestic, after an altercation or dispute, in order to allow his master sufficient time to reconsider. In the present instance, on the contrary, no sooner has the quarrel occurred than he immediately takes advantage of it, and deprives the master of the power of taking any other course than that which he has taken. It was a wise principle of the old law which ordained that a servant should obey his master; and I feel that a departure from the rule, in the present case, by this court, will undoubtedly tend to establish the new and rather prevalent idea that the master should obey his servant.

Sir L. H. LAFONTAINE, Bt., Chief-Justice: It is perfectly clear that Respondent has been dismissed by Appellaant, without any just cause, since there is nothing in evidence to shew that the former had misconducted himself in such a manner as to warrant his dismissal. An attempt has been made to raise a point in favor of Appellant, to the effect that there was actually no dismissal of the servant by him; and that the latter had voluntarily left the service himself. This pretension cannot, however, be maintained, in the face of the letter written by Appellant to Respondent's attorneys, immediately before the institution of the action in the court below.

The judgment of this court is, therefore, that the judgment of the Superior Court, rendered on the fourteenth day of June, 1859, be confirmed.

MONDELET, Justice : I coincide with the judgment of the court in this matter. The declaration on oath of the master should not have been accepted as evidence in support of a defence such as has been set up in the present case. The *serment* of the master may be admitted to prove the terms of the engagement, advances of money, or payments made to the servant, but he cannot, at the same time, appear in the character of a witness, and depose as to facts relating to the conduct of the domestic. Strange to say, in the present action, after the *enquête*, Appellant was actually examined as a witness, and upon his testimony rests the greater portion of the defence. On the other hand, the Respondent has, in my opinion, fully made out his case before the Superior Court, while Appellant has failed to establish a single allegation.

Judgment of the court below confirmed. (10 *D. T. B. C.*, p. 278.)

VANNOVOUS, for Appellant.

LÉGARÉ and MALOUIN, for Respondent.

PROCES PAR JURY.—NOUVEAU PROCES.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 19th June, 1860.

Before Sir L. H. LAFONTAINE, Bart., Chief Justice, AYLWIN, DUVAL, MONDELET and BADGLEY, Justices.

TILSTONE *et al.*, Appellants, *and* GIBB *et al.*, Respondents.

Jugé : Que, dans l'espèce, une motion pour un nouveau procès, par la raison de mal direction du juré de la part du juge, le juge n'ayant pas donné d'instruction quant à l'imputation des paiements, doit être maintenue.

This was an appeal from a judgment rendered in the Superior Court, dismissing a motion for a new trial made by Appellants. The facts of the case, as well as the arguments of counsel, will be found fully given in the report of the case in the Superior Court. (1)

DUVAL, Justice, *dissentiente :* The question here is one of imputation, and, therefore, a question of law. The Respondents took two securities for the payment of their timber, the notes, and the timber itself. Now, the receipts given by the clerk, MacFarlane, are not binding upon them, because he was not authorized by them to make the imputation ; and Tilstone and Son certainly had no right to make the imputation,

(1) 7 *R. J. R. Q.*, p. 211 et 217.

because it was agreed, by them and Respondents, that it was to be a cash transaction, and they could not, therefore, make the imputation without the consent of Respondents. Then, as respects the other Appellant, Routh, he is not injured by the judgment appealed from, because he could not get an assignment of the action from Respondents, inasmuch as the latter, holding both the notes and the timber, had no right of action themselves, and, consequently, could assign no right of action to Routh. I am, therefore, of opinion that the judgment of the court below is correct.

Sir L. H. LAFONTAINE, Bt., Chief-Justice : Les Tilstone font aux Demandeurs trois paiements, dans le mois de juin 1858, savoir les 2, 16 et 17 juin. Celui du 2 juin est de $1894 13 et celui du 16 juin de $4000, en tout $5894 13, ce qui excède de quelques centaines de dollars, le montant du premier billet. C'est le commis des Demandeurs qui a reçu ces deux paiements. Chacun des reçus, écrit de la main de l'un des Tilstone, mais signés par le commis qui recevait et qui était chargé de recevoir, fait expressément l'imputation sur le premier billet qui est échu le 16 juin. Chargé de recevoir, le commis était nécessairement autorisé à donner un reçu du paiement. Ce commis dit qu'il n'avait aucune instruction particulière, relativement aux billets, si ce n'est de recevoir. Il n'avait donc pas de la part du créancier, d'instruction quant à l'imputation. Il est de règle qu'en pareil cas, le débiteur est libre de faire lui-même l'imputation. Les Demandeurs, qui le savaient, ou étaient censés le savoir, ont donc, en s'abstenant de faire eux-mêmes l'imputation, laissé leur débiteur libre de la faire. Il est un peu trop tard pour le commis de venir nous dire qu'il n'a pas fait attention à cette partie des reçus. Aucune convention n'était précédemment intervenue entre les parties sur l'imputation à faire des sommes que le débiteur pourrait payer, ni aucune convention que, nonobstant des paiements excédant le chiffre porté dans le premier billet, ce billet serait néanmoins gardé par les Demandeurs, pour le faire valoir en entier, même après ces paiements, pour la garantie, comme il a été dit quelque part, contre les fluctuations possibles dans le prix du bois. Et si les parties à qui il était libre de faire des conventions à cet égard, n'ont pas jugé à propos d'en faire, nous n'avons pas le droit d'en faire pour elles. Le fait que le billet a pu être déposé à la banque pour *collection*, quelques jours avant son échéance ne saurait en aucune manière affecter la position du Défendeur. Car le billet n'avait pas changé de mains ; après comme avant ce dépôt, il était la propriété des Demandeurs. Le tout se réduit donc à l'application des règles sur l'imputation. Le créancier qui pouvait la faire lui-même, ne la faisant pas, le débiteur a

le droit de la faire. Il avait deux motifs puissants d'imputer ces deux premiers paiements sur le premier billet ; d'abord, c'était la dette la plus onéreuse pour lui, car il y avait une caution. Ensuite devenant exigible avant le second billet, le débiteur et sa caution étaient exposés à être poursuivis, même avant l'échéance du second billet. Dans toute cette affaire on a semblé perdre de vue la caution. Mais cette caution a quelque chose à dire. En cautionnant le billet qui échéait le premier, elle a sans doute voulu que ce billet fût payé le premier, et que, par conséquent, les premiers paiements du débiteur servissent à l'acquitter, avant d'être imputés sur le second.

MONDELET, Justice : The question is simply this : has the note sued upon, namely, that of the 30th October, 1857, due 18th June, 1858, been paid ? Gibb and Ross pretend that McFarlane had no power to give such a receipt as that of the 2nd June, 1858 ; and besides, that Tillstone and Sons had no right to make, upon that note, the imputation of the amount so paid, which should have gone in extinction of the other part of their claim ; that is, was that the consideration for their consent to the delivery of a portion of the timber ? The jury have, it would seem, together with the learned Chief-Justice taken that view of the case ; but I do not at all coincide in such an opinion. How can Gibb and Ross pretend that McFarlane was not authorized to give such a receipt ? Was it not McFarlane who closed the transaction by the written words ; " Settled in notes, Gibb and Ross per D. McFarlane ? " Was not McFarlane sent by Gibb and Ross to Tilstone and Sons to receive the money, and, of course, to give a receipt ? As to the lame excuse resulting from McFarlane's not having read the receipt, or given it sufficient attention, or given the receipt in a hurried manner, it is not to be countenanced. He should have paid attention ; he should not have given a receipt in a hurried manner, and, if he did, he is not to be allowed now so to shift his responsibility by giving a lame excuse which surely does not entitle him to much favour at the hands of the court, and which should not have found favour with the jury. As to the imputation, the debtor had a right to make it on the most onerous debt, namely, the note then due, and that which had been endorsed by Haviland Routh and Co. Besides, had no imputation been made by the debtor, the law would have made that same imputation. There being no evidence, or surrounding circumstances, to justify either the jury or the court in saying that there was, between the parties, a contract or an agreement to the contrary, I am of opinion that the judgment of the court below should be reversed ; nor should a new trial

be granted. We have the facts and they justify a judgment in favour of Defendants.

BADGLEY, Justice : The fact appears to be overlooked that this was a time-bargain, only to take effect in June and July following, and, like all other vendors, Respondents had the right of retaining their goods until the conditions were complied with, These deliveries of timber and payments made upon them, were facts to be decided by the Jury, and the Jury did decide, and it would be a poor compliment to McFarlane or his employer to say that they had not sufficient perspicacity to look at the notes and receipts. But now to the facts of the payments and the law concerning imputations. The receipts shew the debtors intention, and McFarlane who was acquainted with the whole transaction, for it was he who conducted the original transaction and received the very notes in question, then received and accepted these receipts, and it would be preposterous to suppose that he did not know the transaction. The Appellants, therefore, having the right by law to make the imputation, did so, and this was not objected to nor dissented from by McFarlane, or by the Respondents, in any way. But supposing that neither party had made the imputation, then the law makes it in favor of the deotor, and relieves him from his most onerous debt, and this was the endorsed note, so that in either case, the imputation is in favor of Tilstone, and I think the judge presiding at the trial ought to have stated the law upon this point to the jury which he does not appear to have done. I therefore concur with the majority of the Court.

AYLWIN, Justice : The first question is, as to the application or appropriation of payments, and it is a simple one. The intention of the debtor is unequivocally expressed on the receipts and the Respondents ought to have instructed their clerck not so to receive them. A prudent man would have drawn the receipt himself and signed it, and ordered his clerck to give this receipt and no other, but instead of this Respondents give no instructions at all, and consequently Appellants make the imputation of payment consonant with every principle of both law and reason, and relieve themselves from the most onerous debt, the note which bore security and became due, the first. If this were not the case, it would have occurred that when the first note became due, the second would have been paid, which would have been unreasonable. The debtors were bound by common honesty to liquidate first the debt upon which their indorser was liable in preference to a simple debt of their own. I now come to the question, whether our law of application of payments is such as merely to create a presumption of payment, leaving it to the jury to find the fact, this is not so, and therefore the judge at

the trial should have told the jury what the law was, and that in law the payments made, were made on account of the note. If this had been done, I do not believe the jury would have found as they did, unless they had been a jury of usurers, and I trust no such jury will ever be found among us.

Judgment reversed. (10 *D. T. B. C.*, p. 284.)

HOLT and IRVINE, for Appellants.

VANNOVOUS, for Respondents.

STUART, OKILL, Q. C., Counsel for Respondents.

QUO WARRANTO.—PROCEDURE.

BANC DE LA REINE, EN APPEL, Québec, 19 juin 1860.

Présent : Sir L. H. LAFONTAINE, Bart., Chief Justice, AYLWIN, DUVAL, MONDELET, et BADGLEY, Juges.

FRASER *et al.*, Appelants, *et* BUTEAU, Intimé.

Jugé : Que la pétition ou requête libellée prescrite par la 12e Victoria, cap. 41, pour l'émanation d'un writ de *quo warranto*, qui énonce d'une manière générale les griefs est suffisante, sans entrer dans les détails. (1)

Les Appelants, par une requête présentée au juge de la Cour Supérieure, dans le district de Montmagny, en vacance, sous l'autorité de la 12e Vict., chap. 41, alléguaient, en substance, qu'ils étaient et avaient été, dequis longtemps, paroissiens, fabriciens et citoyens notables de l'œuvre et fabrique de la paroisse de Saint-François, rivière du Sud, et que, comme tels, ils étaient contribuables de la fabrique ; que l'Intimé s'était emparé, illégalement, de la charge de marguillier de l'œuvre et fabrique de la paroisse, qu'il s'intitulait, faussement et illégalement, marguillier, et que, sous ce titre, et en cette qualité, il était entré, le 1er janvier 1859, dans le banc d'œuvre de l'église paroissiale, y était demeuré pendant tout le service divin, comme se prétendant l'un des marguilliers, qu'il en avait pris et exercé les fonctions, et s'était, de plus, immiscé dans les affaires de la fabrique, et avait reçu de l'argent comme l'un des marguilliers d'icelle. Ils alléguaient aussi que l'Intimé n'avait aucun droit à cette charge, qu'ils étaient tous intéressés dans l'exercice d'icelle, vu qu'elle confère le droit de prendre part à l'administration et gestion des affaires de la fabrique ; et, qu'en conséquence de l'usurpation et détention de la dite charge par l'Intimé, ils se considéraient lésés. Par leurs conclusions, ils demandaient à ce qu'il fût ordonné à l'Intimé de montrer et prouver l'autorité en vertu de

(1) V. art. 1018 C. P. C.

laquelle il s'était permis d'occuper et exercer la dite charge, qu'il fût déclaré qu'il n'y avait aucun droit, et trouvé coupable de l'avoir usurpée et de s'en être emparé illégalement, qu'en conséquence, il serait dépossédé de la dite charge, et, de plus, condamné à une pénalité n'excédant pas £100. Cette requête fut accompagnée de deux affidavits, alléguant, entre autres moyens de nullité de l'élection de l'Intimé à la charge de marguillier, le défaut d'avis de convocation huit jours au moins avant celui de l'élection ; la présidence du curé à l'assemblée, où il remplissait en même temps les fonctions de secrétaire ; des erreurs commises par lui dans l'enregistrement des votes ; et son refus d'en enregistrer, lorsqu'il se présentait encore des voteurs. L'Intimé répondit à cette requête, par une exception à la forme, alléguant qu'elle n'était pas libellée tel que voulu par la loi, et qu'elle ne contenait que des raisons générales, tandis que, par la loi, elle devait contenir tous les moyens et les raisons spéciales sur lesquels les Requérants fondaient leur demande. La Cour Supérieure maintint cette exception, et la requête des Appelants fut renvoyée par le jugement suivant : "The court considering that the declaration is general, and does not contain any special allegation from which the usurpation therein complained of can be inferred, or which Defendant is in law bound to answer, doth maintain the *exception à la forme,* and dismiss the declaration and the action of Plaintiffs, *quant à présent.*" C'est de ce jugement dont était appel.

Fournier, pour les Appelants : Les Plaignants ne sont obligés que d'alléguer les faits constituant l'usurpation ou possession illégale d'office. (1) Bien loin que ce soit aux Requérants à énoncer les moyens de nullité de l'élection de l'Intimé, c'est au contraire à lui de justifier de son autorité à l'exercice de cette charge. (2) La procédure des Appelants en n'alléguant que les faits d'usurpation dans leur requête, et en les établissant, *primâ facie*, par affidavit, se trouve donc conforme à la lettre et à l'esprit de la loi ; et il en a été ainsi décidés dans plusieurs causes. (3)

Casault, pour l'Intimé : La loi exige que la requête ou déclaration soit libellée. Que signifie ce terme, dont on s'est servi en connaissance de cause dans nos ordonnances, sinon que le Demandeur ou Requérant doit donner les moyens sur lesquels il appuie la demande qu'il fait ? Pourquoi a-t-on changé la procédure ? Pourquoi cette déclaration ou requête, qui doit être servie à la partie que l'on veut déposséder, si elle ne doit con-

(1) 12 Vic., chap. 41, sec. 1.

(2) Ibidem, sec. 2.

(3) 3 *R. J. R. Q.*, p. 4, et dans les causes jugées dans le district de Québec, de *Dussault et al.* vs. *Giroux*, no 731 ; et *Boutin* vs. *Fitzpatrick*, no 2111.

tenir que ces mots laconiques: " Vous usurpez, je demande qu'on vous déplace ?"

DUVAL, Justice, *dissentiente*: This is a petition in the nature of a *quo warranto.* The one question here is: whether we will follow the english rules in these cases, or whether we shall interpret the above statute as introducing a change in these rules ? Now, I hold that the statute makes no change or alteration whatever, and is not intended to do so; it provides for a *requête libellée ;* which is an exposition of the grounds of complaint, thus confirming, as I view it, the old well settled practice laid down in England, and which has been found to work for the public good. The majority of the court, however, think differently, and consequently, the judgment of the court below is reversed.

Sir L. H. LAFONTAINE, Bt., Juge-en-Chef: La procédure dans cette instance est fondée sur le statut de 1849, 12e Vict., ch. 41. Les Appelants, prétendant que l'Intimé n'a pas été légalement élu marguillier de la paroisse de Saint-François, rivière du Sud, district de Montmagny, et que, par conséquent il a usurpé les fonctions de cette charge, ont présenté au juge résidant dans le susdit district, une requête, sous l'autorité du statut, appuyée sur deux affidavits. Là-dessus, le juge a ordonné l'émanation du bref demandé. Il a donc, au premier abord, été satisfait de la requête et des affidavits. Cependant, plus tard, en conséquence d'une exception à la forme, il a débouté les Appelants de leur plainte, sur le principe que leur requête n'était pas suffisamment libellée. La requête me paraît avoir été rédigée dans les termes du statut. Cela devait suffire, comme cela a suffi dans la cause de *Crébassa* et *Peloquin* (3 *R. J. R. Q.*, p. 4). On ne doit pas ajouter aux formalités dont le statut s'est contenté. Si, dans sa réponse, le Défendeur invoque un titre quelconque, sa partie adverse, le Requérant, l'admettra ou l'attaquera, selon qu'il le jugera à propos. Ce titre peut, par lui-même, présenter des moyens de l'attaquer avec succès, moyens que les Requérants peuvent n'être pas en état de connaître, avant que le titre soit produit. Il n'y a pas lieu, ici, de recourir aux formalités si compliquées de la procédure anglaise en pareille matière. Notre statut a été fait pour faire disparaître ces formalités, et leur substituer un mode plus simple et plus sommaire d'arriver au même but. Je suis d'avis que l'exception à la forme aurait dû être rejetée, et que, par conséquent il y a lieu d'infirmer le jugement dont est appel.

MONDELET, Juge: Le statut n'exige qu'une requête générale et c'est au Défendeur à faire valoir son titre et à le spécifier. Bien que nous n'ayons pas à regarder au droit anglais qui régit le *quo warranto,* l'on peut, néanmoins, remarquer que le *quo warranto* comporte la signification de

tout ce procédé, montrez l'autorité dans le titre en vertu duquel vous prétendez vous immiscer. Le jugement de la cour inférieure est mal fondé, et doit être infirmé.

AYLWIN, Justice, expressed his concurrence in the judgment of the court.

BADGLEY, Justice, concurred in the reasons assigned by the Chief-Justice.

Jugement infirmé. (10 *D. T. B. C.*, p. 289.)

FOURNIER et GLEASON, pour les Appelants.

CASAULT et LANGLOIS, pour l'Intimé.

RIVIERES NON NAVIGABLES.—PECHE.

QUEEN'S BENCH, APPEAL SIDE, Québec, 16 décembre 1859.

Before SIR L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

BOSWELL, Appellant, *and* DENIS, Respondent.

Jugé : 1° Que les rivières non navigables et non flottables, sont la propriété privée des propriétaires riverains, qui en ont conséquemment le contrôle exclusif. (1)

2° Que la rivière Jacques-Cartier est une rivière non navigable et non flottable, et que les propriétaires riverains ont subséquemment le droit exclusif d'y faire la pêche.

The Respondent brought his action, in the court below, to recover damages, for alleged trespass by Appellant, for having fished in that portion of the river *Jacques-Cartier* which bounds Respondent's property ; the declaration alleged that Respondent, had been in peaceable possession for more than a year and a day before the *trouble*, or injury complained of, of a property, in the parish of Pointe-aux-Trembles, bounded by the river *Jacques-Cartier ;* that this river was *ni navigable ni flottable*, and consequently, the exclusive use of its waters, in that portion which bounded his property belonged to him, *jusqu'au fil de l'eau* (reserving all legal servitudes), and, more particularly, the *droit de pêche ;* that, in the month of June, 1858, Appellant laying claim to a *droit de pêche* threw a fishing line into that portion of the river which bounded Respondent's property, and exercised the privilege of fishing therein, against his will and consent, and without his permission ; the declaration then concluded for damages. Plea, that the river *Jacques-Cartier* was *flottable* and that the *droit de pêche* therein, belonged to the crown, and not to the riparian proprietors. The Appellant admitted having fished on the

(1) V. art. 400 C. C.

occasion and in the manner complained of; and evidence was adduced to establish the character of the river. By the evidence, it appeared that, in certain places, all along its course, the river was obstructed by falls and rapids, and at the intervals between these impediments, both above and below Respondent's property, it was free from obstructions and had a depth of 12 or 18 feet, in dry weather; that, after heavy rains, it would rapidly swell, in some places, from a depth of a few feet to 30 feet; that rafts had never been floated down it, and that, even those who had floated down saw logs, had abandoned the attempt as being too expansive, from the loss occasioned by the numerous obstructions which existed at intervals, all along the course of the river; that, at some places, it was three arpents wide, and, at some of those intervals, where no impediments or obstructions existed, a *bateau* could be employed as a ferry. At the argument, it was admitted that the object of the action was merely to try the question as to the right of Respondent, as riparian proprietor to prevent others from fishing in the river, opposite his property and only nominal damages were therefore asked for. The court below maintained the action, and awarded damages to the amount of five shillings.

CHABOT, Justice: In rendering judgment, remarked that the proof clearly established that the river was neither *navigable* nor *flottable*, and that it was merely *flottable à bûches perdues*; that the majority of the french authorities, even before the new code, held, that the *seigneur* himself was not the proprietor of such rivers, but that the riparian proprietor had the exclusive right of property in them; and that this doctrine had also been held in this country, since the conquest, and in some instances, before that period. Where the *seigneur* had this right, he exercised it in virtue of his office of *haut-justicier*, and that since the conquest, this office had ceased to exist, as had been held, in numerous decisions in our courts, and also by the decision of the Seigniorial Court, which also held, that rivers of the character of which the *Jacques-Cartier* was proved to be in the present case, were the property of the riparian proprietors; that, consequently, Respondent was entitled to recover damages; that he had not, in all probability, the right to prevent people from crossing the river, but that he had an undoubted right to prevent people from fishing in it to his prejudice; that, in accordance with the understanding between the parties, merely nominal damages were awarded. It was from this judgment that the appeal was instituted.

KERR, for Appellant, contended, that, according to the evidence, the *Jacques-Cartier* was a river *flottable*, and the

property thereof was consequently vested in the crown. That a river was *flottable, quand elle peut porter des trains ou radeaux ;* but was not considered *flottable à bûches perdues seulement.* (1) That the distinction between rivers *flottables* and *non flottables* was not so clearly laid down by the authorities, as so important a line of distinction merited, and that it was impossible to say from the descriptions they gave, whether a river were *flottable* or not. That the doctrine laid down by the french writers, with respect to rivers in France, was not applicable to the rivers of this continent ; that there was scarcely a river in Lower Canada which was not *flottable,* according to those writers, in some part of its course, and that therefore, it would be desirable to establish a rule in order to distinguish a *flottable* from a river *non flottable ;* that it would seem that the idea of these writers was to declare all rivers of *a depth insufficient* to float a raft and of a depth only sufficient to float firewood in the piece, as *non flottables ;* the depth of the river then would appear, according to them, to be the test to be applied here declaring it *flottable ;* what depth of water then was requisite in order to float firewood in the piece ? *(à bûche perdue). Dictionnaire de l'Académie,* vbo *Bûche.* A river or rivulet of two feet deep surely would be sufficient. Could it then be pretended, that the river *Jacques-Cartier,* which in the spring and fall, rushed through its channel nearly thirty feet deep, on an average, and which, even in the driest months of the year, rose, above its summer level, ten or twelve feet, in one night, was but a stream, down which firewood alone could be floated ? Could it be pretended that a river, of a breadth, in some places, of from two to three arpents, with a volume of water such, as it was proved in this case, the *Jacques-Cartier* poured into the St. Lawrence was *non flottable.* That there were few rivers in Lower Canada which were navigable or *flottable* throughout their entire course : the Ottawa, St. Maurice, Chaudière, Etchemin, rivière du Sud, St. Francis, were all impeded, in certain parts of their courses, by rapids and falls far greater than those of the Jacques-Cartier, and had never been attempted to be claimed as private property. That it was a question whether courts of law had the power to decide whether a river was *flottable* or *non flottable ;* that, in France, all the authorities concurred in vesting in the *pouvoir administratif* sole jurisdiction in such matters, expressly declaring that the tribunals had nothing to do with such questions : that the question involved in the case was of great importance as it tried the question of property in salmon fisheries, throughout the settled parts

(1) 2 Marcadé, 377.

the Province, many of which had been leased by the government to lessees paying value on rivers in no way more *flottable* than the *Jacques-Cartier*, which fisheries, should the judgment of the court below be maintained, never belonged to the Province, but to the riparian proprietors.

FOURNIER, for Respondent, argued, that the evidence clearly established that the *Jacques-Cartier* was neither *navigable* nor *flottable*, and, as such, the exclusive right of fishing thereing belonged to the riprarian proprietor, opposite his property, and *jusqu'au fil d'eau* (1). That, even if the *Jacques-Cartier* was *flottable* in every other part of its course, except that portion of it which was opposite Respondent's property, such portion not being *flottable* would fall within the domain of private property, and would consequently be the property of Respondent. (2) That the action brought by Respondent was the proper one to establish his rights. (3)

AYLWIN, Justice: I have the misfortune to differ from the majority of the court. I don't find that Respondent has proved, as alleged in his declaration, that he was in possession of one half of the river, for a year and a day but he has brought proof to shew possession *animo domini*, of a piece of land bordering on the river, but this description of his land does not include the river; the judgment of the court below is an exceedingly dangerous one by declaring such a river as the *Jacques-Cartier non flottable*, and vesting the property of it in the seignior or riparian proprietor. I object to the judgment also because it is founded on a *droit de pêche*, now, we have no such *droit* in existence here, and, therefore, there has been no such *trouble de pêche* as represented or complained of. Our rivers cannot be compared with those of France or Europe; the *Jacques-Cartier* is a good sized river, and has plenty of water, it has rapids, it is true, but, because Hamilton or Dubord (witnesses in the case) could not float timber down it, they conclude that it is not *flottable*; these persons may not have used sufficient precaution, could they not have avoided casualties by assisting nature, by erecting slides and taking other measures to overcome the difficulties they met with. I believe the river

(1) *Questions seigneuriales*, vol. A., pp. 72, 73, 74 ; 1 Garnier, p. 9, D. A. 12, 1027, n° 4 ; Proudhon, n° 857 ; 15 Duranton, n° 200 ; Favard de Langlade, *Rép.*, vbo *Servitude*, sec. 1 ; 3 Duranton, n° 203 ; Merlin, vbo *Rivière*, sec. 1, n° 3 ; Favard de Langlade, *Rép.*, vbo *Vicinalité*, sec. 2 ; Daviel, p. 144 ; Chardon, p. 75 ; Cormenin, p. 38.

(2) Merlin, *Rép.*, vbo *Rivière*, sec. 1, n° 3 ; 1 Garnier, p. 14 et suivante ; 5 Duranton, n° 203 ; Favard de Langlade, *Rép.*, vbo *Servitude*, sec. 1 ; Proudhon, *Du domaine public*, p. 752.

(3) Proudhon, n° 994 ; 2 Dalloz, *Dictionnaire de jurisprudence*, p. 210.

to be both *navigable* and *flottable*. The property of Respondent was not marked and staked out to a certain depth in the river, and, therefore, there could be no trouble ; it is therefore not the case of a riparian proprietor in England, who marks out his property by line and stake. There is, consequently, in my opinion, a total absence of any claim on the part of Respondent.

Sir L. H. LAFONTAINE, Bart., Chief-Justice : It has been clearly proved that the river is neither *navigable* nor *flottable ;* this being proved, Appellant has admitted having fished in it, on the side of and opposite to Respondent's property, and, by the decision of the Seigniorial Court, it is held and decided that rivers *non navigables et non flottables* belong to the riparian proprietors, the judgment of the court below must therefore be maintained.

MONDELET, Juge : Le jugement dont est appel, est du 1er juin 1859, rendu par la Cour Supérieure, à Québec (CHABOT, juge), maintenant le Demandeur, Denis, dans sa possession riveraine. sur la rivière Jacques-Cartier, et condamnant Boswell, le Défendeur, à payer au Demandeur cinq schellings de dommages, pour avoir pêché dans la rivière, sur la devanture de la terre du Demandeur, et aux dépens de la première classe. L'action était intentée pour £60 (action de seconde classe.) Le Défendeur a plaidé que la rivière Jacques-Cartier est navigable et flottable, que le Demandeur pouvait avoir eu, depuis l'an et jour, possession de sa terre, mais non de la rivière qui est dans le domaine de la couronne. Interrogé sur faits et articles, le Défendeur admet avoir péché, au temps et lieu dont il est question, ce fait est en outre constaté par une partie de la preuve. Quant à l'admission des parties, elle est insuffisante et ne va pas assez loin dans l'intérêt du Demandeur, de sorte que, s'il n'avait pas les allégués de sa déclaration qui renferment une plainte distinctement articulée que le Défendeur a pêché, et que le Défendeur l'a admis sur faits et articles, il est évident que le Demandeur serait sans preuve, mais le fait est patent. Quant à la rivière Jacques-Cartier, il est clairement prouvé, par un grand nombre de témoins produits par le Demandeur, et en partie par ceux du Défendeur, que cette rivière n'est ni navigable ni flottable. Il s'ensuit qu'elle est propriété particulière, et non dans le domaine de la couronne. Le Demandeur, par conséquent, était en droit de se plaindre comme il l'a fait, sa preuve est complète, le jugement qui est bien motivé est, suivant moi, bien rendu, quant au mérite, mais, quant aux dépens, il me semble que la cour a erré ; elle ne pouvait tout au plus qu'accorder les dépens comme dans une action de seconde classe. Serait-il nécessaire de réformer le jugement, quant à ce point, je le pense, mais Boswell devra

payer les frais en appel, comme ceux de la cour de première instance.

Le jugement est confirmé. (10 *D. T. B. C.*, p. 294.)

KERR, W. H., for Appellant.

FOURNIER and GLEASON, for Respondent.

SOCIETE.—ACTION EN REDDITION DE COMPTE.

QUEEN'S BENCH, APPEAL SIDE, Québec, 19 juin 1860.

Before Sir L. H. LAFONTAINE, Bt., C.-J., AYLWIN, DUVAL, MONDELET, and BADGLEY, Justices.

MILLER, Appellant, and SMITH, Respondent.

Jugé: Que l'action en reddition de compte ne compète pas à un individu réclamant une part dans une société, en vertu d'une convention en raison de laquelle il devait recevoir une certaine partie des profits de la société pour lui tenir lieu de salaire pour ses services, dans le cas où il a violé cette convention en se retirant de la société avant l'époque fixée par telle convention, et avant que les affaires de la société n'aient été réglées.

In the month of June, 1855, Peter Smith, the Respondent entered into an agreement with Appellant, whereby the former obliged himself to superintend the working of a certain paper mill in which Appellant possessed an interest; and to attend, generally, to the share which Appellant owned in the business of a partnership of paper manufacturers. The contract further stipulated that Appellant should pay to Respondent one half of the undivided third which he owned in the business, or one sixth of the whole, in consideration of the services which Respondent then undertook to perform. The terms of agreement stated that the same should last for one year, from the 1st day of May, 1856, to the 1st day of May, 1857; and, finally Appellant agreed to use all diligence in having the stock of the business taken, and a correct balance sheet of the affairs of the partnership made out and furnished to Respondent. In accordance with the terms of the agreement, Respondent superintended the business until the 15th day of September following, when difficulties arose between the parties, and Respondent left the service of Appellant. It would appear that the disagrement and dissatisfaction were mutual, and that the parties separated by tacit consent, Appellant persistently denying in the course of the action which ensued, that he had discharged Respondent from his service. At the expiration of the year, Respondent, not having been able to obtain an account or settlement from Appellant, instituted an action in the Superior Court, to compel him to render an account of

his share in the partnership business, as stipulated by the last clause of the agreement between them. To this action Appellant pleaded, 1stly: That Respondent had ceased to act in his service on the 15th day of September, altogether of his own accord, and that he had since obtained another situation in the United States; 2ndly: That Respondent had received, or drawn from him, during the time he was engaged in superintending his business, a sum of £130, which sum far exceeded the value of the services rendered by him to Appellant; 3rdly: That Respondent had, during the period of his service, neglected Appellant's business, and, in fact, afforded good reason for the termination of the connection; 4thly: That Appellant could not render a full account to the claimant, inasmuch as a large quantity of the goods belonging to the partnership remained on hand, while a considerable amount had been disposed of in open account or for bills not yet matured. To this plea, Respondent demurred, setting forth the following reasons: 1stly: That Respondent was entitled to the conclusions of his declaration, his action being brought to obtain an account of monies received and a statement of the affairs of a partnership which existed between him and Appellant, although he had ceased to give his time to the business in the month of September; 2ndly: That Appellant was bound to furnish an account, even in case Respondent had received a sum of money over what his services were worth; 3rdly: That he was entitled to the conclusions taken by him, although it should be true that he had behaved insolently towards his partner, or absented himself from the duties of the partnership; 4thly: That Appellant was bound to give the account sought and claimed, although it were true that a quantity of the goods of the partnership remained unsold, or had been disposed of on open accounts, or for bills not yet at maturity. This demurrer was sustained by the court, and Appellant's plea dismissed. The decision was appealed from by the latter.

HOLT and IRVINE, for Appellant, contended that the contract entered into by the parties was an entire one, and indivisible; there was a hiring, for the specified period of one year, the compensation for which service was to be one moiety of his employers' profits. The rendering of the services agreed upon, during a stipulated period, was, therefore, a condition precedent, and Respondent could have no action while he had not performed his part. The parties had made an express contract, and the law would not imply or raise a different one. If Respondent could, rightfully, throw up his engagement in September, and demand an account, he would have had an equal right to do so after he had been only one week employed.

It was obvious that there could be no principle of equity to support such a proposition.

CAMPBELL and KERR, on behalf of Respondent, argued that, in whatever light he was to be viewed whether as partner or clerk, the only action Respondent could institute to establish his rights was the one he did institute. As a partner, the proper action against his former partner was one to account; or, as a clerk, having no fixed salary but a share in the business, the only means by which his salary could be established was by obtaining an account of the profits of the copartnership during the year of the agreement. If Respondent was to be looked upon as Appellant's clerk; and, admitting, for the sake of argument, that the severance of the business connection between the parties was entirely the fault of Respondent, the exception of Appellant was still insufficient in law to meet Respondent's action. Whatever might be the doctrine of the English law upon the subject of the dismissal of the clerk or servant by the employer or master, it did not apply in the present instance. The justifiable dismissal of the clerk, or the severance of the contract between the two, did not, by the principles of the french law, cause a forfeiture of wages which, in this country, must govern in cases similar to the present. If the master had been aggrieved by the conduct of the servant, he had the benefit by the rules of the same law of an incidental demand for damages to the servant's action for wages. In this case, it was the duty of Respondent to ascertain the amount of Appellant's share in the business, before he could make any claim for his salary or share. Having ascertained this, it would still remain for him to consider whether he should, in case of payment being refused by Appellant, sue for the whole of his share during the year of agreement, or only for the period during which he managed the mill of the copartnership. And it could only be when Respondent had sued for his share or salary, that Appellant could urge the grounds of exception he had urged: and then only if joined to an incidental demand for damages.

AYLWIN, Justice, remarked that the action having been brought by Respondent to make Appellant shew, by means of a full and complete balance sheet or detailed account, what the undivided share of the business of the partnership claimed by him amounted to, was very properly resisted by Appellant, on the ground that Respondent had, himself, abandoned the business of his own accord, besides having drawn or otherwise obtained possession of certain sums more than sufficient to remunerate him for his share or services. The Appellant had also rightly pleaded that the partnership was not closed, a large quantity of the goods not being yet sold. To this plea

Respondent had replied, and, upon his demurrer, he had succeeded in obtaining the judgment appealed from. It was evident, however, from all principles of law and equity, that the plea of Appellant, in answer to Respondent's action, was well founded and should be maintained, inasmuch as it very properly alleged in answer to an action to account based upon a breach of contract, that the contract of partnership was broken by the party instituting the action. The decision of the court was, therefore, that the judgment of the court below be reversed. (10 *D. T. B. C.*, p. 304.)

HOLT and IRVINE, for the Appellant.

CAMPBELL and KERR, for the Respondent.

OPPOSITION EN SOUS-ORDRE.

QUEEN'S BENCH, APPEAL SIDE, Québec, 20 juin 1860.

Before Sir L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, DUVAL, MONDELET and BADGLEY, Justices.

DOYLE *et al.*, Appellants, *et* MCLEAN, *ès-qualités*, Respondent.

Les propriétés de certains mineurs ayant été saisies, le tuteur des mineurs fila une opposition, et fut colloqué pour une certaine somme. L'Appelant avait, *le jour fixé par la cour pour l'homologation du rapport*, fait motion pour filer une opposition à fin de conserver,en sous-ordre, en vertu d'une réclamation fondée sur un jugement contre le père des mineurs. La motion fut rejetée, pour la raison que le jugement en question avait cessé d'être exécutoire, et que l'allégation de l'insolvabilité du tuteur était insuffisante, sans en même temps alléguer l'insolvabilité de la succession appartenant aux mineurs. Sur appel de cette décision, il fut :

Jugé : Que le jugement dans la cause devait être maintenu, et que la réclamation des Opposants, ayant été produite si tardivement, était propre à priver les mineurs de l'usage de certaines sommes dont ils avaient besoin. (1)

Savoir : Si la réclamation en pareil cas n'aurait pas dû être faite au moyen d'une action contre les mineurs.

In the Superior Court, at Quebec, a judgment had been obtained by George Wilson, against William James Wilson, Henry McLean Wilson, George William Wilson, Joseph Johnson, curator to John Arthur Wilson and Ann Elizabeth Wilson, all legal representatives of William Wilson deceased. In satisfaction of this judgment, a portion of the real estate which had belonged to the late William Wilson was sold by the sheriff, including the share of Ann Elizabeth Wilson. Lachlan McLean, husband of the said Ann Elizabeth Wilson, and tutor of her two minor children, issue of a former marriage with Richard Charlton, filed an opposition in the cause, to be

(1) V. art. 753 C. P. C.

paid out of the proceeds of the sale of the real estate of the late William Wilson a sum of money due and owing to the minors in right of their father. This opposition was contested by Reed, an Opposant who had purchased the rights of one of the heirs Wilson. After contestation, the minors, represented by their tutor, succeeded in having it dismissed, and in being collocated for a sum of £1629 8 11. When this contestation had been terminated, and, upon the day fixed by rule for the homologation of the report, Appellants, Elizabeth Doyle, and her husband, Edward John Charlton, the latter having been a subtutor to the minors, moved for leave to file an opposition *à fin de conserver, en sous-ordre,* to Opposant, Lachlan McLean, in his quality of tutor. The grounds of the opposition of Appellants were these. It appeared that, in October, 1848, a judgment was obtained by Couture, and another, against the late Richard Charlton and his wife, Ann Elizabeth Wilson, for the sum of £103 3 7. In the month of February, 1850, another judgment was obtained against the same parties, jointly and severally, by the firm of Ryan, Brothers and Chapman, for £783 12 11. By a notarial deed of transfer, passed in April, 1851, Couture assigned the first above mentioned sum to Ann McDonald, widow of Bernard Charlton, who, in June, 1858, assigned it to Elizabeth Doyle. In January, 1851, Ryan, Brothers and Chapman, by notarial act, assigned a sum of £639 6 5, the balance of the second above mentioned sum, to James Bernard Charlton, who, in October, 1858, also assigned the same to Appellants. By reason of the foregoing premises, Appellants concluded that the property and rights in the real property of Richard Charlton had become mortgaged for the payment of the judgment in question, and that Appellants, had a right to be collocated, *en sous-ordre,* inasmuch as there were no monies belonging to the estate of Richard Charlton out of which they could be paid, with the exception of the proceeds for distribution in the cause. The Appellants also produced the latter judgment, by which it appeared that it was rendered upon an obligation of Edward John Charlton, one of Appellants, to which Ann Elizabeth Wilson, and the late Richard Charlton, brother of Appellant, became parties as sureties. Appellants did not allege the insolvency of the tutor; neither did they file an affidavit of indebtedness. The Respondent laid before the court a statement of facts in the form of two affidavits, in reply to the allegations of Appellants. The first was by Ann Elizabeth Wilson, wife of Respondent, and mother of the minors Charlton, which set forth that the estate of the late Richard Charlton was perfectly solvent, there being, as appeared by the report of distribution, an excess of several hundred pounds, belonging to the estate, over

and above the claim of the intended Opposants *en sous-ordre.* That there were valuable immoveables belonging to the estate, in the city of Quebec, besides personal property to the value of several hundred pounds. That, after the payment of all the debts of the late William Wilson, there would remain to the credit of the deponent, Ann Elizabeth Wilson, and her children, the minors Charlton, a sum of about three thousand pounds, besides a share of two sixths in certain real estate. The affidavit then referred to judgments upon which the claim was founded, and the deponent went on to state : That she had been induced by her late husband, Richard Charlton, to come to the relief of his brother, Edward John Charlton, one of Appellants, by mortgaging her estate in favour of Ryan, Brothers and Chapman, and that, in consequence, the obligation alluded to in the claim of the intended Opposants *en sous-ordre* was made and executed. That the assignment of January, 1851, to James Bernard Charlton, must have been made by deponent at the request of Richard and Edward John Charlton, in order to protect them from their creditors. That, some three or four months before the date of the assignment Edward John Charlton had informed her, Ann Elizabeth Wilson, that the mortgage had been paid off, shewing her, at the same time, certain receipts purporting to be signed by Ryan, Brothers and Chapman, in favour of Edward John Charlton. That deponent had no doubt whatsoever that the obligation was paid by Edward John Charlton, to Ryan, Brothers and Chapman, before the assignment to Elizabeth Doyle. Speaking of the judgment for £103 3 7 first mentioned in the claim of the intended Opposants, deponent alleged : That Ann McDonald had been also paid and compensated for the full amount of the same, before the alleged assignment thereof by the occupation of a house belonging to the estate of William Wilson, and by the assignment of a large quantity of township lands, made by deponent and her late husband, in favor of Ann McDonald. The other affidavit referred to, was made by Lachlan McLean, the present Respondent, and simply stated that Edward John Charlton had, in answer to an inquiry made by Respondent, informed the latter that the mortgage which Ann Elizabeth Wilson had signed, as surety for Edward John Charlton, in favour of the firm of Ryan, Brothers and Chapman, had been paid off and discharged. In reply to the allegations contained in the affidavits, Edward John Charlton filed his own affidavit, setting forth, in substance : That the estate of Richard Charlton was not sufficient to pay to Opposants the amount of their claim, unless the monies to be distributed were applied to the payment of their claim. That the real estate mentioned in the affidavit of Ann

Elizabeth Wilson was not worth more than twelve hundred pounds, and was, moreover, burdened with the debt owing to George Wilson. That Lachlan McLean, tutor to the minor children, was not possessed of sufficient real property to secure to the latter the sum of money for which he had been collocated, *ès qualité ;* and, further, that the sum of money in the hands of McLean would not be adequately secured to the minors. That Ann Elizabeth Wilson and the minors Charlton had no real estate, with the exception of a share of one sixth of a certain property in Palace street. That, at the time of the making of the obligation by Richard Charlton and Ann Elizabeth Wilson, the former was indebted to the deponent in a large sum of money, for money lent and advanced, for board and lodging and other necessaries; and that Ann Elizabeth Wilson was also indebted for her own support, and the support of her minor children, in a large sum of money, to deponent, which debt was never paid or satisfied. That, at the time of the making of the obligation before alluded to, Richard Charlton and Ann Elizabeth Wilson were to have become the principal debtors towards the firm of Ryan, Brothers and Chapman, but that, having, become mere sureties by the error of the notary, the deed was never changed, owing to the confidential relationship of the parties which then made it a matter of indifference. The deponent further stated distinctly, that he had never told Ann Elizabeth Wilson, or Lachlan McLean, that the debt arising therefrom, or any part thereof, had been paid, although he might have told the former that Ryan would never trouble her. In answer to the allegation of Ann Elizabeth Wilson, relative to the judgment first mentioned in the claim of Opposants *en sous-ordre,* deponent, Charlton, stated that Ann McDonald was not indebted to Ann Elizabeth Wilson, or the estate of her father, for the rent of the house, inasmuch as Ann McDonald only lived therein as a member of deponent's family, Ann Elizabeth Wilson and her family then also living therein and being supported by deponent, Edward John Charlton. The motion of Appellants for leave to file their opposition *en sous-ordre* was, however, rejected, by the Superior Court, at Quebec, on the 1st day of June, 1859, and this was immediately followed up by a judgment homologating the report of distribution. Hence arose the present appeal.

PARKINS, for Appellants, contended that an attempt had been made to assimilate an opposition *en sous-ordre* to an execution, or *saisie-arrêt,* although an important difference existed, and this view of the matter was no where to be found in the french authorities. The one divested the debtor directly of the possession of his property ; the other only dealt with property already under sequestration. Viewing the case of

general principles, the necessity, in France, of an executory title to oppose *en sous-ordre*, had relation only to the certainty of the debt thereby ascertained, and not to the faculty of execution, the law in relation to seizure and execution having regard chiefly to the protection of the debtor in the *possession* of his property, so that he could not be dispossessed, except in virtue of a title of a character certain in all respects, and clothed with certain formalities. But it would be seen that where property was already *en mains tierces*, so that no necessity existed to dispossess the debtor, a much laxer rule obtained. How much more so should it be when the property in question was already attached before the court whose natural duty it was to protect creditors and enforce the payment of debts. It should also be observed that the title of Appellants was actually executory under the french law, no difference being made, in that respect, by the change of creditor. (1) It had been stated by the last motive of the judgment appealed from that the insolvency of the tutor himself should have been alleged ; now it was clear that Appellants were entitled to deal with the tutor as an *être moral*, and it was therefore unnecessary to allege his personal insolvency. Moreover, it was an established principle that the choice of remedy was optional with the creditor. It would be unjust to deprive him of a simple remedy, and drive him to two actions, one of them an action to account. The pretension in question was also rebutted by the fact that certain persons were entitled to the tutorship of their children apart from all considerations of insolvency. With regard to another point, it had always been the practice of the court to permit claimants, under a notarial deed or other title, in its nature certain and indefeasible, to file an opposition *en sous-ordre*, without reference to the solvency of the debtor's estate. They also claimed the right to file their opposition under the express provisions of the 169th article of the Custom, which subjects the estate of a deceased debtor to arrest by a creditor, though his title has ceased to be executory by reason of the death of the debtor.

STUART, Q. C., for Respondents, in reply, urged that it was evident from the affidavits filed in the case that the debt due to Ryan Brothers and Chapman was paid off by Edward John Charlton the real debtor ; and contended that, as he did not deny this *imputation*, he had no right to renovate the debt, so as to cover his pretended board and lodging account. Further, that Mrs. Charlton was not a judgment creditor of Respondent, having the power of putting such judgment in

(1) Commentary on art. 169 of the Custom of Paris.

execution against the minors, so far as Ryan's judgment was concerned, because, firstly : such power being vested in Ryan Brothers and Chapman, they had not transferred it to Charlton and his wife ; the same objection being equally strong in the matter of the other judgment. Secondly : because such judgment before being executory against the minors, heirs of Richard Charlton, ought to have been declared so by a competent court. The pretended assignees of the debts had some eight years for the fulfilment of the latter formality, but they had not done so. Had they instituted an action for that purpose, the persons charged with the protection of the minors could have then shewn cause why such judgment should not be declared executory against them.

MONDELET, Justice, *dissentiente:* It appears to me that the court below should not, in such a peremptory manner, have disposed of a matter in which such an array of facts was set up by the parties respectively ; but should rather have permitted the filling of the *opposition en sous-ordre,* on payment of costs, as prayed for by Appellant. Considering the importance of the question, it is entitled to a much more lengthy discussion and careful investigation than the court below appears to have deemed necessary. There should have been a contestation of the opposition in the only usual and admissible way. With regard to the delay which must have been occasioned by such a contestation, all that can be said is that it is a necessary inconvenience which is of daily occurrence. An apparent right has been shewn by Appellants ; and nothing can, in my opinion, justify the closing of the door upon such an application. I dissent, therefore from the majority of the court, and I am of opinion that the judgment of the court below, homologating the report of distribution, is erroneous, and that it should be set aside, and the parties ordered to take such course as to law and justice may appertain.

DUVAL, Justice : The court below, notwithstanding the judgments which have been appealed from, has not pronounced upon the merits of the claim proferred by Appellants, and by reasons of which they demand to be collocated *en sous-ordre.* In this matter, I am of opinion that the court acted in a very judicious manner ; and so far as the decisions appealed from are concerned, it has merely prevented Appellants and intended Opposants *en sous-ordre,* from stepping into the cause at the eleventh hour, and depriving the minors Charlton of the use of certain monies which they undeniably require for their daily subsistance. This does not, as a matter of course, deprive Appellants of their lawful recourse against the minors in question, in the shape of an action for the recovery of any monies or necessaries advanced to them. The judgment of

the court below, that Appellant do take nothing by their motion for leave to file an opposition *à fin de conserver en sous-ordre*, was therefore confirmed. (10 *D. T. B. C.*, p. 309.)

ANDERSON and PARKIN, for Appellants.

STUART and MURPHY, for Respondents.

AUDITEUR.

QUEEN'S BENCH, IN APPEAL, Montreal, 31 mai 1860.

Before Sir L. H. LAFONTAINE, Bt., Chief-Justice. AYLWIN, DUVAL and MONDELET, Justices.

ELLIOT, *ès qualité*, Appellant, and HOWARD Respondent.

Sur le rapport d'un auditeur cité plus bas, la Cour Supérieure condamna le Défendeur à payer £46 2, le montant réclamé par l'action, avec dépens, y compris les frais de l'auditeur; le jugement fut réformé en appel et réduit à £36 10 5, mais maintenu quant au frais accordé par le tribunal inférieur, mais sans frais d'appel, et :

Jugé : 1. Que la référence à un auditeur n'était pas sanctionnée par l'acte de judicature de 1857, 20e Vic, cap. 44, sec. 92 (1) dans un cas où il ne s'agissait pas de règlement de comptes.

2. Que le rapport était irrégulier et eût dû être rejeté, et que sous la section suscitée les rapports d'auditeurs doivent être traités et homologués comme le sont les rapports d'experts.

The action was instituted against one Orr, to recover £46 2, for board, lodging, and liquors, and cash advanced, as per account furnished. Orr died during the progress of the suit: and after issue joined, Appellant, as tutor to the minors Orr, was brought into the cause.

The Defendant pleaded : *First*, That, in July, 1855, he, Orr, was invited with his family to visit Respondent and did so, and passed some time with Respondent without stating what time, but that neither " Defendant (Orr) nor his family boarded or " lodged with Plaintiff, or were boarders during any of " the time mentioned in the declaration. " *Second*, That, even if he so boarded and lodged with Plaintiff, the charges were excessive; he thirdly pleaded compensation to the account filed to the extent of £16 5, but produced no evidence, except the notarial lease mentioned below. The Plaintiff examined

(1) Cette clause est dans ces termes : " Dans toutes causes, maintenant ou qui seront à l'avenir pendantes, entraînant règlement de comptes, il sera loisible aux dites cours, respectivement, d'ordonner audition de compte, et de renvoyer tout compte ou matières de comptes en question dans toute telle cause, à une personne ou à des personnes entendues en pareilles matières et habiles comme auditeurs, avec pouvoir d'agir et d'en faire rapport en la même manière que font les experts dans les causes dans lesquelles des experts peuvent être nommés en vertu de la loi ; — les rapports seront traités comme le sont des rapports d'experts. "

V art. 340 C. P. C.

several witnesses to prove the items of board only. The case was heard on the merits, on the 17th March, 1859, and, on the same day, the court, BADGLEY, Justice, rendered judgment, *avant faire droit*, naming "John G. Dinning, of Montreal, ac- " countant, *auditeur*, in the cause, to examine the accounts " of the parties on both sides, and to establish the balance " due to Plaintiff from the evidence of record or such other " evidence as may be adduced by the parties, and to make " his report to this court in the premises without delay." The following is the report of Dinning : Having con- " sulted with, and examined Coleman, of the Montreal " House, and having examined the books of Serafino Ge- " raldi, and ascertained the amount charged therein for the " board of John Orr and his three sons: having also examined " Plaintiff, and taking into consideration the filthly habits of " the late Defendant, and the great trouble, expense and an- " noyance caused thereby, I am of opinion that the charges " made against the estate of John Orr, viz.: amounting to the " sum of forty-six pounds, two shillings, as per account filed " of record, are fair and reasonable." Montreal, 25th May, " 1859." (Signed), — JOHN G. DINNING, Accountant. On the 31st May, the court, BADGLEY, Justice, rendered the following judgment: " The court having heard the parties upon the " merits, seen and examined the report of the accountant, and " also the evidence, doth condemn Defendant, *par reprise d'ins- " tance, ès qualité*, to pay to Plaintiff, Catherine Mary Howard " the sum of forty-six pounds, and two shillings, for the causes, " matters and things mentioned and set forth in the declara- " tion, with interest thereon, from the 16th day of November, " 1855, date of service of *process* in the original action, until " actual payment, with costs, including costs of said accoun- " tant." The Appellant contended that the judgment ought to be reversed for the following reasons: 1. no notice of any kind was given by Dinning to Appellant or his counsel; nor was the nomination mentioned by the Judge in court. No opportunity was afforded to Defendant of producing any evidence; and after the report was fyled (on the 26th May) no new inscription was made, and no hearing had on the report: 2. the case was not one which ought to have been treated as falling under the 92nd section of the judicature act of 1857; the matter at issue not " involving the adjustment and settlement of accounts," but simply the proof of a few items of a hotel-bill; 3. the accountant evidently based his opinion on the affidavit of Plaintiff, which he had no right to take and, even if it were to be taken as evidence, it referred to items of *board only*, which, if granted in full, only amounted in all to £34 2s 6d. The other items in the account being

wholly unsupported by evidence; 4. the report was simply the report of *an opinion*, and the rule, in effect, named Dinning as a judge or arbitrator, with power to hear and decide upon evidence, and not as accountant simply. In addition to this, there was a notarial lease of the moveables set forth in the schedule annexed to the lease from Orr to Plaintiff. This lease was for £19 per annum, payable quarterly, being the interest on the price of the moveables, the first payment whereof fell due on the 1st November, 1855, which sum should have been deducted.

Sir L. H. LaFontaine, Bt., Chief-Justice, held that the case was not one which should have been sent to an accountant. That the report was irregular and should have been rejected, that such reports were, under the statute, to be acted upon and homologated in the same way as reports of experts; that, as to the board and lodging, there was, in the opinion of the court, sufficient evidence of record, without the report, and the judgment would be reformed as to the amount, giving credit for an item of rent under the lease.

Duval, Justice: The report should have been rejected by the court below, if for no other reason than that it was calumniatory of the dead. But the case should not have been sent to an accountant.

Judgment: Considérant que l'action de la Demanderesse avait pour objet de recouvrer la somme de £46 2, courant et que le jugement dont est appel condamne la partie Défenderesse à payer cette somme, tandis que cette condamnation n'aurait dû être que de la somme de £36 10 5¼, dit cours, y ayant lieu de retrancher du montant de la demande les deux articles suivants, savoir £4 13 9, pour deniers prêtés, aucune preuve n'ayant été faite de ce prêt, et £4 17 9¾ étant le premier quartier du loyer des meubles de Orr, échu le premier novembre 1855, et par lui offert en compensation; que, par conséquent, il y a lieu de réformer le jugement en réduisant la condamnation à la somme de £36 10 5¼. Confirme le jugement rendu le 31 mai 1859, par la Cour Supérieure siégeant à Montréal, et ce, jusqu'à concurrence, seulement, de la somme de £36 10 5¼ à laquelle, en réformant le jugement, cette cour réduit le montant de la condamnation qu'il porte, avec intérêt sur la somme de £36 10 5¼, à compter du 16 novembre 1855, jour de l'assignation en cour de première instance; maintient la condamnation aux dépens, et la distraction de ces dépens prononcée par le jugement; mais sans frais sur le présent appel. (10 *D. T. B. C.*, p. 317.)

Robertson, A. and W., for Appellant.

Carter, for Respondent.

PROCEDURE.—AMENDEMENT.

CIRCUIT COURT, Quebec, 18th June, 1860

Before TASCHEREAU, Asst.-Judge.

POULIN, Plaintiff, *vs.* LANGLOIS, Defendant.

Jugé : 1° Que, si un Demandeur, dans une action en revendication d'un objet mobilier, a omis de conclure d'une manière suffisante pour rencontrer toutes les éventualités de la cause, il ne lui sera pas permis de prendre des conclusions supplétoires pour rectifier l'omission.

2° Que le seul remède, dans ce cas, est la motion pour amender.

The action was in revendication, instituted by Plaintiff against Defendant, to obtain possession of a horse, the property of the former, and illegally detained by the latter. The horse was not seized by the bailiff who had charge of the writ of revendication, a determined resistance having been offered by Defendant and a number of his friends. A writ of *contrainte par corps* for a contempt of court was thereupon sued out against Defendant, and proceedings had thereon. In the meantime, however, it appeared that Defendant had managed to make use of the interval which elapsed to sell, or exchange the horse, so that it could neither be found nor seized by the officers in charge of the writ; after a variety of proceedings had been had, a motion for leave to take supplementary conclusions was made on behalf of Plaintiff. After setting forth the resistance of Defendant to the writ and *alias* writ of revendication, and the fact that Defendant had managed to make away with the horse, by sale or exchange, and that it had not, therefore, been yet seized, the motion concluded in these words: " The Plain-" tiff therefore, moves that he be permitted to take supple-" mentary conclusions (*supplétoires*) in addition to those by " him already taken in the declaration by him made and filed " in this cause ; and doth pray further that Defendant be con-" demned to pay unto him the sum of twenty five pounds, " being the value of the horse, besides the further sum of ten " pounds, for damages which he has already claimed in his " declaration, amounting in all to the sum of thirty-five pounds " currency, for which sum the present action has been insti-" tuted."

TASCHEREAU, Justice : La permission de prendre des conclusions supplétaires ne s'accorde que dans certaines actions que le Demandeur intente dans le but de parvenir à un résultat que lui est inconnu au moment de l'institution de son action, telle que l'action en exhibition de titres, de la part d'un seigneur contre son censitaire, dans laquelle le Demandeur conclut, en première instance, à ce que le Défendeur soit tenu de lui faire exhibition de ses titres, et se réserve de prendre

de nouvelles conclusions après l'exhibition. La Cour du Banc de la Reine a sanctionné ces nouvelles conclusions dans la cause de Gugy et Chouinard. (1) Mais je dois avouer que ce n'est pas sans difficulté que ce même tribunal en est venu à cette décision, tel qu'on peut s'en convaincre en référant au motivé du jugement. (2) Dans le cas présent, le Demandeur devait anticiper toutes les difficultés qui pourraient lui être offertes de la part du Défendeur ; et il aurait dû conclure en première instance, non seulement à la revendication de l'objet, mais même à ce que le Défendeur fût condamné à en payer la valeur dens le cas où, par son fait, ce Défendeur se fût mis dans l'impossibilité de représenter l'objet revendiqué. Cette omission ne se peut remédier que par une demande en amendement de la déclaration. Je me fonde aussi pour renvoyer l'application du Demandeur sur l'autorité du *Nouveau Denisart* vbo *Conclusions*, p. 83, § 3, qui est en ces termes : " Les " parties et leurs défenseurs ne sauraient faire trop d'attention " à la rédaction des conclusions qui font le fondement de " toute la procédure. C'est souvent de conclusions bien ou " mal prises que dépend le succès d'une affaire. Celui qui varie " dans ses conclusions, et qui occasione par là des frais, doit " les supporter." The motion was rejected accordingly. (10 *D. T. B. C.*, p. 322.)

BOSSÉ and BOSSÉ, for Plaintiff.

PLAMONDON and DÉCHÈNE, for Defendant.

FRAUD

PRIVY COUNCIL, ON APPEAL from the COURT OF QUEEN'S BENCH FOR LOWER CANADA, 16 juin 1860.

Présent : The right Hon. the Lord Justice KNIGHT BRUCE, the right Hon. Sir EDWARD RYAN, the right Hon. the Lord Justice TURNER, and the right Hon. Sir JOHN TAYLOR COLERIDGE.

JOHN SHAW and RICHARD JEFFREY, Appellants, and JAMES JEFFREY, Respondent.

Where an instrument has been entered into between two parties for a purpose which may be considered fraudulent as against a third party, it may yet be binding as between themselves. A supposed fraudulent intention as to third parties cannot be interpolated in construing an instrument as to the rights of the contracting parties.

Mere suspicion of a fraudulent intention to protect property against the just claim of third parties will not suffice to establish the fact that

(1) 3 Revue de législation, p. 308.

(2) Ibid., p. 328.

the transaction was wholly colourable as between the original parties to the instrument, as such a transaction is not as between themselves rendered void, because it may have the effect of defeating the claims of creditors.

In circumstances, held upon the construction of certain instruments that, taken together, they did not operate as a mortgage, but as an absolute sale, to which was attached a conditional right of repurchase to be exercised on the happening of a given event.

This was an action of account brought by the Appellants against the Respondents in the Superior Court of Lower Canada.

The declaration stated that the Appellants built at *Quebec* two vessels, the "Eliza" and the "Kate"; that these two vessels took in cargo, and sailed for *England* in the year 1848, that the Respondent collected the freight earned by the vessels, and also sold the vessels in *England*, and received the price for them, and by the declaration the Respondents was called upon to render an account to the Appellants of the freight, and of the moneys arising from the sale; and to pay to the Appellants the price of the two vessels, and the freight earned by them. In the declaration the freight was assessed at £4,000 currency and the value of the vessels at £16,000. Two pleas were filed by the Respondents to this declaration. The first plea was a perpetual exception in law. This plea set up a sale and assignment to the Respondent of the two vessels by two deeds, executed on the 9th of *December*, 1847, in consideration of the sum of £3671 11 11, under one deed, and for the sum of 5s. by the other deed. The plea further alleged the delivery by the Appellants to Respondent of the two vessels in an unfinished state, and that the Respondent finished and sent them to *England* on his sole acconnt. The second plea was a general traverse of the facts stated in the declaration.

To the first plea the Appellants replied by a general traverse of the facts stated therein, and by two special answers. The first special answer stated that the Respondent had agreed to advance to the Appellants a sum not exceeding £10,000 to enable them to complete the vessels, upon the pledge and security of the ships and of the materials in the ship-yard and premises belonging to them, and that to carry out this arrangement several deeds were executed on the 9th of *December*, 1847, two of which hereinafter mentioned, were set out by Respondent in his plea, and a third deed of agreement executed on the same day, and part of the same transaction, was also set out; and the answer averred, that

the Appellants completed the ships, and offered to redeem the pledge, but that the Respondent failed in his obligation under the last mentioned deed to render a true and just account of the moneys advanced. The second special answer set forth certain facts relating to the loan mentioned in the first special answer, by the Respondent to the Appellants, upon a pledge of the ships, and alleged that it was a usurious transaction, and that the deeds executed on the 9th of December, 1847, for the purpose of that loan were null and void. The facts, as they appeared from the evidence, were, in substanse, as follows:

The Respondent, for many years before the year 1847, was a ship-builder, having a ship-yard at Hare Point, at Quebec. In August, 1847, being desirous of retiring from business, he leased the ship-yard to the Appellants for a term of two years and nine months, and sold them all his stock and materials in the yard for about the sum of £1,500. The Appellants had entered into partnership under the name of Shaw, Jeffery & Co, in the early part of 1847, and that partnership continued until December, 1848, when it was dissolved. Previously to the spring of the year 1847, John Shaw had been a hardware merchant; Richard Jeffery, a brother of the Respondent, had been engaged in ship building in the employ of the Respondent. The Appellants were building two vessels, called The *Kate*, and the *Eliza*, in the autumn of 1847, and had purchased large quantities of timber and materials for that purpose from the Respondent and others. In the month of November, 1847, the Appellants were forced from want of funds to suspend their works. The Respondent was, at that time, their creditor to a considerable amount, and had advanced them the sum of £1,686 3s. 5d. to enable them to proceed with the building of the ships and to purchase materials for the same, and they applied to him for further advances, and the result was that on the 9th of December, 1847, six deeds were executed at one and the same time. The Appellants were at this time largely indebted to other parties.

The first of these instruments was between the Appellants, John Shaw of the firm of Shaw, Jeffery & Co., and Richard Jeffery, of the one part, and James Jeffery of the other part, and recited that Shaw, Jeffery & Co., were the owners of and held in the ship-yard of James Jeffery certain timber intended for ship-building purposes, particularly mentioned in a schedule annexed; that Shaw, Jeffery & Co., were indebted for the purchase-money of the goods to different persons from whom they acquired the same, namely Anderson & Paradis, Pikersgill, Tibbits & Co., Dunn, Colvin & Co., and James Jeffery; that Shaw, Jeffery & Co., were willing to sell, assign, transfer and make over to James Jeffery upon the

conditions thereinafter mentioned, the timber and the frames of two ships or vessels, to be, when completed, of the burthen of 750 tons each, which offer James Jeffery had agreed to accept. That John Shaw and Richard Jeffery, for and in consideration of £3671 11s. 11d. thereby bargained, sold and assigned to James Jeffery, his heirs, executors, administrators and assigns, all the timber, materials and effects then in the ship-building yard, together with the frames of the two ships or vessels, and all the premises assigned to James Jeffery, his executors, curators, administrators, and assigns for ever, without any account to them or any other whatsoever to be made, answered, or thereafter to be rendered; so that neither they John Shaw and Richard Jeffery nor any other for them, or in their name, should have any right, title, interest, or demand of, in, to, or for the timber, materials, effects, property and the frames of the ship-lying in the ship-building yard of James Jeffery, or to exact, challenge, claim or demand at any time or times thereafter, and that all action, right, estate, title, claim demand, possession, and interest thereof should be wholly barred and excluded thereby.

The second instrument related to the sale of the two vessels and was also dated the 9th day of December, 1847, being made between John Shaw and Richard Jeffery, of the one part, and James Jeffery, of the other part, and recited that John Shaw and Richard Jeffery, for divers good causes and considerations and, for and in consideration of the sum of five shillings currency, paid by James Jeffery, had granted, bargained, sold assigned and set over to James Jeffery, his heirs, executors and administrators, all the hulls, frames and bodies of the two ships then building in the ship-yard of James Jeffery, at Hare Point; the ships when completed to be of the burthen of 750 tons measurement each, and all the timber, plank, and furniture then prepared for the ships; to have and to hold the ships or vessels, and other the above bargained premises unto James Jeffery, his executors, administrators, and assigns, to his own proper use and behoof, and as his own proper goods and chattels, from thence forth for ever; and John Shaw and Richard Jeffery, for themselves, their heirs, executors administrators and assigns, covenanted and agreed with James Jeffery, his executors, administrators, and assigns, that they had a good right, full power, and lawful and absolute authority, to grant, bargain, sell and assign, for ever, and that the same should be and remain and continue unto James Jeffery, his executors, administrators, and assigns, free and clear of all former bargains, sales, gifts, grants, titles, debts, charges, and incumbrances whatsoever. And, further, that John Shaw and Richard Jeffery, their executors or administrators, should and

would, from time to time, and at all times thereafter, at the request of James Jeffery, make, do, and execute, or cause and procure to be made, done, and executed, every such further and other lawful and reasonable act or acts, deed or deeds, conveyance and assurances in law whatsoever for the further, better and more effectually conveying, assigning and assuring the thereby bargained and sold premises or any part thereof unto James Jeffery, his executors and administrators. The third instrument was an agreement, also dated the 9th of December, 1847, by John Shaw and Richard Jeffery, of the one part, and James Jeffery of the other part. It recited that James Jeffery had, in the month of August then last past, leased to John Shaw and Richard Jeffery, trading as aforesaid, all his ship building yard and premises at Hare Point, and did alsa sell and assign to them all his stock, materials, &c., &c. in the shipbuilding yard. That Shaw, Jeffery & Co., had commenced building two ships, to be of the burthen of 750 tons each, or thereabouts, old register measurement, and had purchased from Anderson and Paradis, Pickersgill, Tibbits and Co., Dunn, Colvin and Co., and from James Jeffery, certain lots and quantities of timber for the purpose of being employed in the building and finishing of the ships; that James Jeffery had advanced to Shaw, Jeffery and Co., to enable them to proceed with the building of the ships and to purchase materials for the same, the sum of £1.686 3s 5d currency; and that Shaw, Jeffery and Co. had declared their inability, in the then present state of the money-market, to finish and complete the ships, and that they had, therefore, offered-to surrender, assign transfer, and make over to James Jeffery the whole of the timber and materials purchased from him as aforesaid, as also all the timber purchased of Anderson and Paradis, Pickersgill, Tibbits and Co., and Dunn, Colvin and Co., on condition of James Jeffery agreeing to accept Shaw, Jeffery and Co's drafts on him payable in the month of July next, in favour of Anderson and Paradis, Pickersgill Tibbits, and Co., and Dunn, Colvin & Co., for the timber and also to surrounder assign, transfer, and make over the frames of the ships in their then present state, and then on the stocks in the ship-building yard being the ship-building yard belonging to him, James Jeffery at Hare Point, and to cancel the lease made to them by James Jeffery, in order that James Jeffery might be enabled to cause the ships to be completed and finished for sea himself. That Shaw, Jeffery and Co., had also agreed to grant to James Jeffery a mortgage on their beach and premises at Point Levy, from the sum of £650, currency, payable in the month of September then next. And John Shaw on his part also agreed to assign and transfer to James Jeffery the sum of £1,000

currency, part of a larger sum due to him, John Shaw, by Richard J. Shaw, and Samuel J. Shaw, of Quebec, hardware merchants, and which sum should be made payable to James Jeffery by monthly instalments of £250, currency, each. And stating further that James Jeffery, and Shaw, Jeffery and Co. had agreed to and with each other as follows: That James Jeffery should re-assign, transfer, and make over to Shaw, Jeffery and Co., the two ships and all other the premises assigned to him, provided they, Shaw, Jeffery and Co., should reimburse him all sum and sums of money that he had already paid, and that he might thereafter pay and lay out in the finishing and completing the ships; and in relation to the premises aforesaid, with interest, and the usual commission of 3½ per cent., upon all disbursements and sum or sums of money paid and agreed to be paid as aforesaid: and Shaw, Jeffery and Company, on their part, agreed to accept the assignment, or bill of sale, of the premises, and to pay or cause to be paid the sums, disbursements, &c., on or before the sailing of the ships from Quebec, with interest and commision as aforesaid, and in the meantime that they would give their personal attendance at the ship-building yard until the ships should be safely launched and until they should be ready for sea, loaded and completed, without any charge to James Jeffery. And it was witnessed that James Jeffery and John Shaw and Richard Jeffery, had agreed, and they did agree to and with each other in manner following, that is to say: That Shaw, Jeffery & Co. agreed to give their personal attendance in the building, finishing and completing, the two ships, and until the ships should be ready for sea, loaded and completed, under the direction of James Jeffery, the same to be done and built in the same manner as other vessels were built, and launched by James Jeffery, namely the ships *Lady Elgin* and *Chippewa*, and to be provided by and at the expense of James Jeffery, with sails, rigging, materials, boats and other things, &., complete for sea, of the best quality and description, so that the ships should not be inferior to other ships built by James Jeffery at Quebec. And John Shaw and Richard Jeffery agreed, that the ships should be completed and ready for sea, and loaded with crew, provisions and outfit on or before the 15th day of June next, for a sum not exceeding in the whole the sum of £10,000 current money of the Province, of which the sums already paid by James Jeffery to Shaw, Jeffery & Co., namely, the sum of £1686 3s. 5d. currency, the stock and materials in the ship-building yard, amounting to £1000 currency, amounting with the interest, to the sum of £1556 3s. 10d. currency, and also the sums agreed to be paid by him, viz. the sum of £655 5s. currency to Anderson &

Paradis, the sum of £553 5s. 9d. currency, to Pickersgill, Tibbits & Co., and the sum of £906 17s. 4. currency, to Dunn, Colvin & Co., formed part, leaving a balance or sum of £4642 4s. 8d. (which included the rent for the ship-building yard, current money aforesaid, to be paid by James Jeffery for workmen, purchase of the rigging, sails, anchors, cables, ropes, boats, masts, spars, provisions, loading the vessels, and all other things necessary, fitting and essential for the vessels, to make them ready for sea as aforesaid. And, it was further witnessed that James Jeffery on his part agreed, that upon John Shaw and Richard Jeffery, paying or securing to him the sum or sums of money by him, James Jeffery, paid or agreed to be paid for the building and completing of the vessels for sea as aforesaid, and all disbursements paid and to be paid for and on account of the ships, materials, workmen and other things whatsoever, and also paying him interest upon the actual disbursements made upon account of the ships, and commission of 3½ per cent., for all disbursements and cash advanced and agreed to be advanced in relation to the ships, that then and in that case James Jeffery should assign, transfer and make over to Shaw, Jeffery & Co., in the usual and customary manner, the two ships and all other the premises assigned or agreed to be assigned, provided John Shaw and Richard Jeffery well and truly paid the same previous to the ships sailing from the port of Quebec. And John Shaw and Richard Jeffery bound and obliged themselves, as the consideration of the sale and assignment aforesaid, to pay to James Jeffery, his heirs and assigns, all the cash, sum and sums of money he might pay and lay out for the building and completing for sea of the two ships, with the interest and commission aforesaid, and of which the sums already advanced and agreed to be paid to Anderson & Paradis, Pickersgill, Tibbits & Co., and Dunn, Colvin & Co., formed part. And in the event of any difficulty arising between the parties with respect to the settlement of their accounts, it was thereby agreed that the same should be left to the decision of two arbitrators, one to be chosen by each party ; such arbitrators to have power to appoint an umpire, and, by the award of which arbitrators, or of one of the arbitrators and the umpire they bound and obliged themselves to abide. And, it was agreed, that upon the payment of £1000, currency assigned to James Jeffery by John Shaw, as by deed executed that day, James Jeffery should and would, if a further sum of £1000 was required, apply the same towards the finishing and completing of the ships, John Shaw and Richard Jeffery having declared that they considered it would require such further sum to finish the ships, independent of the sum of £10,000, therein referred to.

The fourth instrument, also dated the 9th of December, 1847, was a cancellation of a lease, and which deed recited that whereas James Jeffery did by lease grant for the term of two years and nine months all the ship-building yard called *Hare Point* and premises attached, occupied by James Jeffery for some years past as a ship-building yard : that John Shaw and Richard Jeffery had, owing to the then present state of the money market, declared their inability to continue the ship-building business, and had requested James Jeffery to resume the possession of the ship-building yard, and to cancel the lease, which James Jeffery had consented to do; and it was witnessed, that the parties had, for divers good causes and considerations, cancelled, rescinded, annulled, and made void the lease and every clause, obligation and condition therein contained, and that they did thereby declare the lease to be null and void and cancelled in the same manner, to all intents and purposes, as if the lease had never been signed or granted. And, that John Shaw and Richard Jeffery having paid all rents to that day, they were hereby discharged and released of all claim and demands in relation to such lease.

The fifth instrument was a transfer of the sum of £1,000, and also bore date the 9th of December, 1847. It set forth, that John Shaw, in consideration of the sum of £1,000, currency, to him paid by James Jeffery, the receipt whereof John Shaw thereby acknowledged, did grant, bargain, and sell, assign, transfer, and set over unto James Jeffery a like sum of £1,000, currency, being part and parcel of a larger sum due and owing to John Shaw by Richard John Shaw and Samuel John Shaw, of Quebec, hardward merchants, namely, the sum of £400 by Samuel John Shaw, and £600 by Richard John Shaw for the stock of goods sold to them by John Shaw, by agreement between the parties, passed in the month of may last, payable as follows; the sum of £150, currency, monthly, by Richard John Shaw and the sum of £100, currency, monthly, by Samuel John Shaw, until payment of the sum of £1,000, currency. To have and to hold the sum of £1,000, aforesaid, thereby sold and assigned, with all interest to accrue and grow due upon the same, unto James Jeffery, his heirs, executors, curators, administrators, and assigns to the only proper use and behoof of James Jeffery, his heirs, executors and curators, administrators, or assigns, thenceforth and for ever. And, that to effect that assignment, John Shaw did thereby put, substitute, and subrogate James Jeffery in the place and stead of him, John Shaw, and in all his right, title, claim, interest and demand, privileges and hypothecs for and respecting the premises, and did thereby constitute and appoint James Jeffery to be his true and lawful at-

torney, irrevocable, with full power and authority for and in the name of him, John Shaw, or of James Jeffery, but to and for the proper use and behoof of James Jeffery, his heirs and assigns, to ask, demand, sue for, recover, and receive the premises thereby assigned, and to transact, compound, acquit, release, and discharge for and respecting the same, and generally all the matters and things whatsoever necessary for effecting the premises, or dependent thereon, to do and perform as fully and amply to all intents and purposes, as he John Shaw might or could do if personally present, thereby ratifying, allowing, and confirming, and promising and engaging to ratify, allow, and confirm, all and whatsoever James Jeffery should lawfully do or cause to be done in and about the premises by virtue theref.

The sixth and last instrument was an obligation and mortgage of the same date, 9th December, 1847, which recited that John Shaw and Richard Jeffery, merchants and copartners, carrying on business together there under the name, style and firm of Shaw and Jeffery, declared, acknowledged and confessed to owe, and to be justly and truly indebted unto James Jeffery, in the sum of £650, currency, being for a like sum advanced and paid to Shaw and Jeffery by James Jeffery previous to the execution thereof, namely, on the 12th day of May last, and which sum was obtained from James Jeffery, for the purpose of and was applied to the payment of the first instalment of the purchase-money of the lots thereinafter described. Which sum of £650, currency, John Shaw and Richard Jeffery did jointly and severally, one for the other and one of them for the whole *solidairement* and renouncing the benifits of division or discussion, promise, covenant, undertake and agree to pay, or cause to be well and truly paid, in good current money of the Province of Canada, unto James Jeffery, his heirs or assigns, or the bearer or bearers of the same presents in due form of law, in the month of September then next, together with legal interest thereon at the rate of £6 per cent., per annum, from the 12th day of May then last past. And, for securing the payment of the sum of £650, current money aforesaid, with the interest to accrue or grow due thereon, John Shaw and Richard Jeffery mortgaged, and hypothecated several lots of ground and beach therein mentioned and described, comprising the Point Levy Cove formerly purchased by John Shaw and Richard Jeffery from Henry Le Mesurier, John Smith and Robert Buchanan, Esquires, assignees of the bankrupt estate of Thomas McCaw, of the city of Quebec, merchant.

Appellants at the trial contended that the third of the abovementioned deeds, relied upon in their first special answer,

disclosed the real character of the transaction between the parties, and that it amounted to a simple contract of *nantissement*, or pledge, upon the timber and materials in Appellants' ship-yard, and upon the ships as they gradually advanced to completion; or in the alternative that it only amounted to a sale, of which the effect was suspended by a condition. And they also contended that, whether the one construction be put upon the deed or the other, Respondent had not performed the conditions so as to give him an absolute right to the vessels and to entitle him to load, and send them to England and sell them, without giving an account of the freights and sales to Appellants. That the recitals of the third deed showed the state of things on the 9th December, 1847, namely, that the Respondent had advanced £1,686. 3s. 5d. to enable Appellants to build and purchase materials; that he was a creditor of theirs to the amount of £1,556, 3s. 10d. in respect of the materials and stock which he had sold them; that he had no security for such sums, and being desirous to be secured, he had agreed to satisfy the claims of the three firms upon Appellants for timber sold by them to Appellants, and to make further advances to Appellants and that Appellants were unable to continue building the ships without such advances.

From the evidence of Cairns and Campbell, two of Appellants' witnesses, it appeared that, just previous to the execution of the deeds, one Lee, who was a creditor of Richard Jeffery, had threatened to make a seizure of the effects in the yard; and it was contended that, there were other creditors of Appellants equally pressing. That if the sole object in view had been to effect an absolute sale and assignment of the ships to Respondent, there would have been no necessity for the third of the above mentioned deeds which was admittedly executed at the same time and formed part of the same transaction, but of which the operative part was quite at variance with the notion of an absolute sale; and that such deed was the deed to be looked to for the purpose of appreciating the understanding and intention of the parties as between themselves. It further appeared from the evidence of witnesses on the part of Appellants, that, on the 11th of December, 1847, the ship-yard and all in it were delivered to Campbell, acting as agent for Respondent. That a sign with the words " Jas. Jeffery," or " Jas. Jeffery's yard," on it was put over the principal entrance into the ship-yard, and remained there during the whole of the winter of 1847-8, and till after the vessels in question were launched. That the object of the sign being put up was stated by Respondent himself to one O'Brien, to have been to prevent a seizure upon the yard by Lee, a creditor of Richard Jeffery, and that for the same reason

watch was kept one night with firearms in the yard. That Appellants continued to build the ships under the direction of Respondent, and to give, as required by the deed of agreement, their personal attention. That Shaw chiefly attended to the financial part of the business, though he was constantly at the yard. That Richard Jeffery, who resided at the house in the ship-yard, and who had been a shipbuilder, attended entirely to the building of the ships, and gave the orders. That Respondent continued to make advances, either by payment of sums to Appellants themselves, or to persons who supplied articles for the ships. That Appellants ordered articles necessary for the building of the ships, and paid for them by drafts on Respondent; though Respondent also ordered articles for the ships. That Appellants paid the wages of the men out of moneys advanced them by Respondent, and that Respondent was generally present at the time when the wages were so paid, but did not interfere, except on one or two occasions. That Appellants gave to Respondent acknowledgments, of receipts, in the name of their firm," Shaw, Jeffery & Co.," for all the weekly expenses of the sums laid out on the ships, including a weekly payment of £3, to Richard Jeffery; which it was contended by Respondent was paid by him to Richard Jeffery, as his foreman. That on the 10th of March, 1848, Respondent made a formal protest against Appellant, John Shaw, for, amongst other things, not giving his personal attendance at the yard, according to the deed of agreement. That the two ships were launched in May, 1848, and were registered by Respondent and were ready for sea, and that Respondent obtained cargoes for them, and they sailed at the end of July, 1848. That on the 13th of July, 1848, a protest by Respondent was served on Appellants, calling upon them to repay the moneys as provided by the agreement executed on the 9th of December, 1847, and requesting payment of disbursements before the 20th of that month; and that on the next day, an account of disbursements, &c., was served upon Appellants, with a memorandum of the amounts attached to it. And that on the 19th of July a protest by Appellants, was served on Respondent, stating that they were willing to resume possession of the ships, and repay the advances as soon as the amount should have been settled according to the agreement, by arbitration, but it did not appear that they had tendered the money, or indeed taken any step to pay it. That the vessels took their cargoes to England, arrived there in safety, and were afterwards sold by order, of Respondent; the *Kate* realizing £4,950, and the *Eliza*, £4,932,18s.

The Superior Court of Lower Canada, on the first of September, 1854, made a decree in favour of the Respondent.

The Court consisting of the chief-justice BOWEN, and the Puisne Judges, MEREDITH and CARON, was unanimously of ovinion, that the deeds and agreement hearing date the 9th December, 1847, formed but one and the same transaction, and that when taken together imported an effective sale of the two vessels and materials therein mentioned and that the character of the sale had not been altered, but was perfected in law by the actual delivery of the effects and that Respondent became proprietor thereof ; that as nothing had occurred to effect or change the right of property of the two vessels at the period when the vessels sailed for England Respondent had a right to sell the same as his own property, without being liable to render an account of the proceeds or of the freight of the two vessels in the manner demanded by the declaration. The court, therefore, maintained the peremptory exceptions perpetual *en droit*, and dismissed the action with costs.

The present Appellants appealed from this decree to the Court of Queen's Bench for Lower Canada, on the appeal side. The appeal was heard by the full court, and, after consideration, judgment was pronounced on the 9th of January, 1857, by which the decree of the Superior Court was affirmed. The Judges were divided in opinion. The Chief Justice Sir L. H. LaFontaine and Mr. Justice Aylwin, being in favour of the appeal, on the ground that the transaction was upon the face of it and from the number of deeds used to carry it out, collusive and fraudulent to defeat the rights of the other creditors of Appellants ; while the other judges Mondelet and Badgley, upheld the judgment of the Superior Court, as in their opinion, there was no evidence of fraud, and that taking the deeds and agreement together the transaction amounted to a sale and not a *nantissement* nor a conditional or suspensive sale ; and the latter judge further held, that the action was wrongly brought as the validity of the deeds was not impugned by Appellants ; Appellants having sought to set them aside without any allegations in the pleadings of fraud.

The present appeal was from this judgment.

Mr. MANISTY, Q. C., and Mr. H. T. HOLLAND, for Appellants: It appears from the evidence and the sound construction of the six instruments executed on the 9th of December, 1847, and which it is not denied form part of one and the same transaction, that the contract between the parties was a contract of *nantissement*, or pledge of the two vessels to Respondent. Pardessus, *Droit comm.*, tome 2, n° 489, p. 316. *Laidler* vs. *Burlinson* (1) or at most, a *vente suspensive*, or

(1) 2 Mee. and Wels, 602.

conditional sale, the effect of which was suspended by a condition. Assuming then that the transaction is a contract of pledge, or a conditional sale, the facts established show that Appellants performed all that was to be performed on their part to entitle them to maintain the action, and Respondent, failed to perform his part of the agreement. He did not take the proper steps to entitle him to sell the two vessels. But Appellants had at least, by virtue of the agreement, a *faculté de réméré* or equity of redemption, of which the Respondent by the sale deprived them, and therefore, he was bound to account to them for the proceeds of the sales and freights claimed as Respondent did not, by the deeds of the 9th of December, 1847, acquire an absolute right of property in the ships and did not subsequently thereto perform the condition precedent to such absolute right vesting in him. In fact the whole transaction was an arrangement to defeat the claims of the other creditors. If it was a sale of the vessels, what was the price given for them ? That nowhere appears. It is certainly not the nominal consideration mentioned in the second instrument. On these grounds, we submit, that the judgments of the Superior and Court of Queen's Bench on appeal were not warranted by the pleadings and evidence in the action.

MR. MONTAIGUE SMITH, Q. C., and MR. W. MURRAY, for Respondent.

No right under the circumstances disclosed by the evidence exits to call upon Respondent to restore the ships, or to account for the profits of the voyages, or proceeds of the sales. Accruing freight passes to the mortgagee of a ship, who takes possession before the conclusion of the voyage. *Kerswill* vs. *Bishop* (1). The two first instruments of the 9th of December, 1847, passed the property in the two ships, and in the timber and materials therein mentioned, to Respondent. Now, if those two instruments are to be read with the third of the same date, it discloses the real nature of the transactions between the parties; for as between Appellants and Respondent it is immaterial whether the transaction was to defeat the claim of other creditors. It is clear that Appellants did not reimburse, and in in fact were not willing or in a condition to reimburse Respondent the moneys he had expended in completing, equipping and loading the ships before they sailed; Appellants, therefore, lost any right of re-purchase they might have had under this instrument. Taken together the deeds constituted an absolute sale and assignment to Respondent of the two vessels.

(1) 2 Cromp., and Jer. 529.

In *Perry* vs. *Meddowcroft* (1), an agreement made upon an advance of money, to convey property, the agreement containing power of redemption within a given time, and, in default, the sale to be absolute, was held to be a conditional sale, and not a mortgage, and the party having made default in payment was declared by the master of the rolls to be absolute. With regard to the accounts, Appellant Jeffery, prior to the sailing of the ships, examined and acknowledged the accuracy of the Respondent's account of the moneys he had expended. Appellants ought, therefore, to have paid the amount of such account before the sailing of the ships. The observations of Appellant as to the consideration given by Respondent is misconceived. The ships were in an infinished state, and sold with the materials and liabilities of Appellants.

But, secondly, we contend, that the action is wholly misconceived, and the allegation wholly unsupported by evidence, the ships not being the property of Appellants, as alledged in the declaration. The first special answer to Respondent's plea of perpetual exception is a departure from the declaration, and puts Appellants' case on a totally different ground. Even if such plea is good, still the evidence shows that Appellants were not ready and willing, previous to the sailing of the ships from Quebec, to reimburse the Respondent as charged in that answer. We submit, that the form of action if any could lay, should have been upon the special agreement to re-sell the ships upon payment of the moneys expended by Respondent, in which action it would be necessary to allege and prove that the Appellants had tendered, and were ready to pay the money or an action might have been brought for refusing to name arbitrators, in which case it would have been necessary to allege and prove in addition to such allegation that a difficulty had arisen between the parties in respect to the settlemeut of their accounts. By the action in its present form Appellants require Respondent to account for and pay over to them the proceeds of the voyages, and of the sale of the ships, notwithstanding the large sum of money Respondent has expended, and which has not been reimbursed to him.

Judgment was delivered by The Lord Justice Knight Bruce :

" This was an appeal from the Court of Queen's Bench for Lower Canada, on the Appeal side ; in which court, the judges being equally divided, a judgment of the Superior Court of Lower Canada in favour of Respondent was affirmed. The Plaintiffs, by their declaration, sought an account from Defen-

(1) 4 Beav., 197.

dant of the value of two vessels, the *Eliza* and *Kate*, built, as they alleged, by them at Quebec, and sold by Defendant in England, and of the freight earned by them in a voyage to the same country; and whether they are entitled to this account will depend on the conclusion to be drawn from the following facts: The Defendant had been, for some years, a ship-builder at Quebec, and the occupier of a ship-building yard there. In August, 1847, he was desirous of retiring from business, and leased the yard to Plaintiffs, who had become partners in the trade, for two years and nine months, and he sold them all his stock and materials, at the same time, for £1,500. The Plaintiffs forthwith commenced building the two ships in question, and, in the progress of the work, purchased large quantities of timber and materials from Defendant and from other persons; but, in the month of November, 1847, they found themselves unable to continue their business, from inability to raise more money in the then state of the money-market. This led to an arrangement with Defendant, which was embodied and carried into effect by as many as six instruments, all of the same date, 9th December, 1847; and the question in the case mainly depends on the true effect of these instruments. The number of these instruments has not unnaturally given rise to much observation in the Appeal Court below, and has been attributed by the judges who were for reversing the judgment of the Superior Court, to fraud and collusion between the parties. Indeed, the whole transaction has been characterized as a mere attempt between them to protect the property from the just claims of third persons. *Their Lordships are not prepared to adopt this opinion*, but the present inquiry is only between the parties to the instruments. Where an instrument between two parties has been entered into for a purpose which may be considered fraudulent as against some third person, it may yet be binding according to the true construction of its language as between themselves. It has not been, and could not well be, argued here, that the instruments were to have no operation; but the supposed fraudulent intention as to third persons has been used for the purpose of determining which of several supposed constructions they were to have between the parties. This is not allowable. The instruments, therefore, must be examined in the usual way, to collect from their language, as accurately as may be, the rights which they conferred on Plaintiff and Defendant respectively. By the first of these, the Plaintiffs, reciting that they are the owners of timber in the ship-yard, specified in schedules attached to the instrument, and are indebted for the purchase money thereof to different persons named, among whom is Defendant, and that they had

offered to sell, assign, and transfer to him the timber before mentioned, and the frames of two ships, which offer he had accepted, in consideration of £3,671 6 11 currency, to be paid in certain specified proportions and modes, bargain, sell and assign the articles aforesaid to Defendant. The words of conveyance are most ample, and unequivocal in their meaning; they profess to give the most complete and exclusive title, with a large warranty against all other persons. The second instrument professes to convey the hulls, frames, and bodies of the two ships for a consideration of 5s. This also is absolute and unequivocal in its language. Why it was executed at all does not appear; *but that it was intended or calculated to favor any fraudulent purpose, their Lordships fail to perceive.* The fourth instrument cancels the lease of the ship-yard, restores the possessession of it to Defendant, and makes the lease as if it had never been granted. The fifth instrument is between one of Plaintiffs only, John Shaw, and Defendant, and by it John Shaw, for the consideration of £1000, acknowledged to have been paid to him by Defendant, transfers and assigns to him two debts of £600 and £400 stated to be owing to John Shaw by Richard John Shaw and Samuel John Shaw respectively, which were to be paid by certain specified instalments. And the sixth instrument is between Plaintiffs and Defendant, and is both an obligation for the payment of £650, acknowledged to have been lent to them by him in the May preceding, and also a mortgage of certain specified lots of ground and beach, which in the same month of May, it is stated had been purchased in part with the money so lent. These three last instruments throw very little, if any, light upon the construction of the two first. They seem to have helped in raising the doubt, which their Lordships have noticed on the honesty of the whole transaction, as regards third persons; but they furnish nothing on which, as we think, any theory can judicially be raised for the interpretation of the two first as between the parties, and since the two instruments speak themselves in unequivocal language, there would be no sustainable argument in the case but for the remaining instrument (the third), which has not yet been noticed. And this must now be examined at some length, for, no doubt, when the same parties execute contemporaneously several instruments relating to different parts of the same transaction, all must be considered together, all must be examined in order to understand each; apparent inconsistencies are to be reconciled and when there are real inconsistencies the governing intention of the parties is still to be collected from a consideration of the language of all the instruments and effect given to it. The instrument no 3 must now

be stated. Its recitals go back to the first assignment from Defendant to Plaintiffs, their operation as ship-builders, and the different loans they had contracted, their declared inability to complete the two ships, their offer to assign to Defendant the whole of the purchased timber and materials, on condition of Defendant making the payments enumerated in no 1, and also the frames of the two vessels, and to cancel the lease of the ship-yard "in order that Defendant, as it is said, may be enabled to cause the said vessels to be completed and finished for sea himself." The agreement to mortgage the beach and premises at Point Levy is also mentioned, and also the agreement by John Shaw to assign to Defendant the £1,000 mentioned in no 5. After these recitals, and before we notice those which follow, it is not immaterial to observe that their subject matter does not appear in the operative part of the instrument, which contains no conveyance of anything conveyed, no doing over again of anything done, by either of the other instruments. The title of Defendant as owner of the ships does not rest on this instrument any more than the title of Defendant as mortgagee of the beach and premises at Point Levy, or as occupier of the ship-yard. All these are mentioned in the recital as having been agreed to be done; they are not, however, done in this instrument, obviously because they had been by the separate instruments already stated. But it will be seen that the effectual operation of those instruments is assumed in the operative clauses now to be stated; and it is made the basis of the stipulations of this instrument, that under the others the present interests has passed to Defendant. For the recital goes on to state that he will reassign, transfer, and make over to Plaintiff the ships and all other the premises assigned to him, on condition "that they reimburse him all moneys that he hath already, or may hereafter lay out in finishing the ships, and in relation to the premises aforesaid with interest, and the usual commission of 3½ per cent. upon all disbursements paid, and agreed to be paid, as aforesaid." And they agree that they will accept the said assignment, and that they will pay the stipulated sums with interest and commission on or before the sailing of the ships from Quebec, and in the meantine they agree that they will give their personal attendance in the finishing of the ships until they are safely launched, ready for sea, and loaded, without any charge to Defendant. Then come the operative parts of the instrument: First, on the part of Plaintiffs that they will give their personal attendance in the building, finishing, and completing the ships, until they are ready for sea, loaded, and completed under the direction of Defendant, with stipulation for the providing of sails and all other necessaries to make them

seaworthy, of the best quality, at his expense. Secondly, they engage that the ships shall be ready for sea and loaded, with crew, provisions, and outfit, on or before the 15th of June then next, for a sum not exceeding £10,000, which sum is made up of those already advanced, and a residue of £4,642 4 8, to be further supplied by Defendant. Then follows a stipulation on the part of Defendant, who agrees that upon Plaintiffs paying, or securing to him, the monies paid or agreed to be paid for the building and completing of the vessels, and all disbursements paid and to be paid on account of them, the materials, workmen, and other things whatsoever, together with interest upon the actual disbursements, and commission of 3½ per cent., he will assign and make over to them the two vessels in the usual manner, provided they well and truly pay the same previous to the sailing of the vessels from Quebec. Thirdly, follows an engagement by Plaintiffs, that as the consideration for such sale and assignment they will make the payments last specified, and to avoid any question the sums already paid, or agreed to be paid, in discharge of their engagements to third parties, are mentioned as being included therein. Then, follows a clause for referring the settlement of accounts in the event of any difficulty arising, and so the instrument ends. But it should seem by a memorandum added below the signatures of the parties, that Plaintiffs having declared that they considered the finishing the vessels would require an additionnal £1,000, Defendant agrees to apply the £1,000 which John Shaw had assigned to him by the instrument no 5, on its payment to him, to that purpose. The instruments have now been stated, and it appears to their Lordships that the meaning of them is clear, and that they present a very intelligible, and consistent, and probable case. The Defendant having been a ship-builder. and desiring to retire from that business, and Plaintiffs, one of them, his brother, who had been in his employ in a prominent capacity in that business, having formed a partnership, the former is content to let and the latter to take the shipyard for a short term, and the former sells and the latter purchase the materials therein. They commence the business, but obviously with insufficient capital; the Defendant assists them in the purchase of more materials, and two ships are begun; the money market turns against them, and they are, in a short time, in difficulties, which they cannot surmount. They desire to retire from the business. The Defendant, who has strong motives to secure the advances already made, and not improbably actuated by personal regard, comes to an arrangement with them; he agrees to take the vessels as they are and the materials in consideration of those advances, and take on himself their liabilities to certain trade creditors, and to release

them from their lease of the ship-yard, and here the arrangement might have ended. If it had stopped here, it is probable that some more minute examination would have been made as to the respective values on either side; the unfinished vessels and materials on the one hand, the advances and liabilities on the other: whether that would have made any considerable difference is not clear, nor is it important to inquire. Because the arrangement did not end here, Defendant, on his part, had, probably, no desire to resume, permanently, the business which he had only just withdrawn from, and they who alleged that their present inability to go on arose from the temporary state of the money market, were obviously desirous of resuming it at a future or more favourable period. They, therefore, agreed to give their personal attendance gratuitously in the completing the vessels, and bind him to spend to the extent, first of £10,000, and subsequently, in a certain event, to apply an additional £1,000 to that purpose. Thus they secure the completion of the vessels: and though they were not their vessels, and they might seem at first to have no interest in what became of them, yet they acquire a contingent interest by the stipulation following, that when finished Defendant shall reassign the vessels to them. To this Defendant agrees, but, as might be expected, he stipulates not only for repayment of his loans, advances, and liabilities by a condition precedent to the assignment, but also that the repayment shall be made before the ships sail; in substance, he agrees to resell, on payment, in which case he is to be considered as having advanced the money, and requires interest and commission as on an advance; but he does not agree to do this indefinitely, a time is fixed, the sailing of the vessels, which, after their crews, outfit, and cargoes are on board, cannot in usual course be any longer delayed: the payment is to be made before that, or the right to a reconveyance will be gone. Upon the plain language of the instruments, and on consideration of the circumstances existing at the time of their execution, Their Lordships think it clear that this was nothing like a mortgage, but was an absolute sale, to which was attached a conditional right of repurchase, to be exercised, if at all, on the happening of a certain event, the period for the happening of which was fully and equally within the knowledge of both parties. Nor does the agreement to refer to arbitration the settlement of the accounts raise any difficulty. This must not be construed so as to defeat an essential object of one of the contracting parties. The Plaintiffs knew well that expenses would be incurred from day to day, down to the very sailing of the vessels; they must have known that to delay the sailing after they were completely ready for sea could never have been contemplated;

and yet they have in effect contended that by creating, or asserting the existence of a difficulty, and insisting on a reference in which many days might be consumed, they could acquire a right to delay their time of repayment and the sailing of the vessels indefinitely. This seems an unreasonable construction of the clause ; but the facts of the case make the construction of the clause ; but the fact of the c iake the construction of it unnecessary, as will be seen .. .ne sequel. This being Their Lordships' opinion, founded on the instruments themselves, it is scarcely necessary to observe that a mere suspicion of a fraudulent intention to protect the property against the just claims of other persons will not suffice to show that the transaction was wholly colourable as between Plaintiffs and Defendant themselves, nor, if the transaction is to be treated as a real transaction, such as it appears on the surface, as between themselves, which Their Lordships consider it ought to be, will it be vitiated, and rendered of no avail, because it may have the effect of defeating the claims of other creditors of Plaintiffs. It remains, then, to consider the subsequent conduct of the parties. Now it appears that the vessels were completed as the instrument would have led one to expect Plaintiffs continuing to act in the yar' before, and Defendant interfering from time to time, giv 'irections, finding money for the wages, and occasionally paying the men ; Defendant's name or sign being put up over the gate of the yard, and the vessels registered in his name. All this, it is true, might be consistent with what Plaintiffs contend for : it is also perfectly consistent with the view which Their Lordships take. They do not rely on it as substantive proof ; it is enough that it is not inconsistent with what the instruments on their face import. The vessels were in all respects ready for sea towards the end of July, and on the 13th July, Plaintiffs were served with a notice that they would be ready for sea on the 20th, and they were called on to repay the moneys due under the agreement on or before that day. At this time it would seem that Plaintiffs were at variance with each other : one of them, Richard Jeffery, admitted the inability of the firm to pay the demand, and that in consequence Defendant must sail the vessels on his own account ; the other, Shaw, made difficulties, first in respect of the accounts, and latterly relied on the arbitration clause. Their Lordships are clearly of opinion on the evidence that this defence is not available to Plaintiffs : they have no doubt that it was resorted to for the mere purpose of delay, that Plaintiffs had not the means of paying the demands however modified, that the sums actually expended by Defendant, and not brought into the accounts rendered, would have far exceeded any reduction which would

have been made in the course of arbitration, and lastly that the accounts rendered were, before the sailing, gone through by a clerk of Defendant, and Plaintiff Jeffery, and, with the exception of a single article questioned, admitted to be correct. They are not satisfied, therefore, that the case has arisen which makes the submission to arbitration imperative and they have already stated their opinion that the clause of reference is not to be so construed as to defeat the main object of the instrument in which it is found. Their Lordships, therefore, are of opinion that, upon the facts, and without reference to the difficulties which arise upon their own pleadings in the way of Plaintiffs, their case fails. In the learned argument for them it was asked, if this was a sale of the vessels, what was the price? To this question the answer is easy; the vessels were sold in their unfinished state, but not alone; the materials in the yard were sold with them, and the price for both was the money already advanced, and the assumption of the liabilities already incurred. But this answer, though true, is an answer to a captious question, which separates one part of the whole transaction from the rest; for it was a sale with the additional right of repurchase attached to it and that right with all the stipulations on both sides dependent on it must be taken into the account, if the considerations on both sides are to be fairly judged. Their Lordships will, therefore, humbly advise Her Majesty that the judgment of the courts below should be affirmed, and that Respondent should receive the costs of this appeal. But they do this without prejudice to any claims which may arise in respect of the instruments nos. 5 and 6. On these, as not arising strictly on the present pleadings, and not having been distinctly brought before Their Lordships, they do not express any opinion. (10 *D. T. B. C.*, p. 340, et 13 *Moore's P. C. Rep.*, p. 432.)

PROCEDURE.—DECLARATION.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 20th June, 1860.

Before Sir L. H. LAFONTAINE, Bt., Chief Justice, AYLWIN, DUVAL, MONDELET and BADGLEY, Justices.

GRAINGER *et al.*, Appellants, and PARKE, Respondent.

Jugé: Que, dans l'espèce, l'action était bien intentée, quoique l'une des parties Demanderesses, qui poursuivait en sa qualité d'exécutrice, en vertu d'un testament fait en Irlande, n'eût pas allégué, dans la déclaration, que, par la loi du pays, elle avait un droit d'action. (1)

(1) V. art. 50 C. P. C.

The action out of which the appeal arose, was brought by Appellants, in the Superior Court, Quebec, to recover the sum, of £20,000, being the balance alleged to be due for advances upon the building of ships made by the firm of David Grainger and Son, of Belfast, in Ireland, to Respondent, in Canada, by means of letters of credit upon the firm of H. J. Johnston & Co., bankers in London, England, where Defendant's bills of exchange were accepted and paid, on the credit so obtained and which advances were to be repaid by the proceeds of the sale of the ships of Defendant in Belfast. The declaration also contained the usual assumpsit counts, and then alleged the decease of David Grainger, at Dublin, in Ireland, and the appointment of his wife one of Plaintiff's as executrix of his last will and testament. The action was brought in the name of his son and surviving partner, John Grainger, and of his wife, in her quality of executrix, and the declaration further alleged that the executrix obtained probate of the will in the court of probate in the district of Belfast. The declaration contained a further count alleging that Defendant promised, at Quebec, to pay Plaintiffs the amount claimed. To this action, Respondent demurred, on the ground, that, inasmuch as it appeared by the declaration, that the quality of executrix claimed by one of Plaintiffs, accrued to her under the law of a foreign country, the declaration should have shewn what her rights were as executrix in that country, and the effect of such foreign law in vesting her, as executrix, with the estate or rights of action of the testator and her capacity to bring the action and to join the co-Plaintiff in bringing the same. The court below maintained the demurrer : " Considering that, by the Provincial Statute, 22 " Victoria, cap. 6, foreign executors are recognized, and their " legal capacity declared to be of equal validity and effect " before all courts in Lower Canada, as in the country or " place where the will of the decease may have been made ; " and, considering that Maria Belinda Grainger, who sues in " the present cause, as executrix of the late David Grainger " her husband, who made his will and died in Ireland, as " appears in the declaration in this cause does not allege, in " and by her declaration, that by the laws of Ireland, as such " executrix, she is vested *with any rights of property in the* " *succession of the deceased*, or with the right of action " for the recovery of the debts due to such succession, and, " more particularly, with the right to sue for the recovery " of the debts due to her late husband, as partner in the firm " of David Grainger & Son, and that without such allegation " Plaintiffs do not disclose any right of action against Defen-

" dant, doth maintain the *défense au fonds en droit*, and dis-
" miss Plaintiff's action."

Austin, for Appellant : The rights and powers of executors of wills are established and recognized by the laws of every civilised country. (1) The probate of the will filed with the declaration is an authentic document, by the 16 Vic., cap. 198, sec. 2. The allegation in the declaration that Defendant promised to pay Maria Belinda Grainger, one of Plaintiffs in her quality of executrix, in Quebec, dispenses with the necessity of producing the will at all, provided such promise is proved. (2) The judgment appealed from is not based upon any exception to the form alleging a want of capacity or *défaut de qualité*.

Parkin for Respondent : The United Kingdom, in common with all other countries beyond the limits of Canada, is to be regarded as a foreign country, in so far as relates to its internal municipal laws. The courts of Canada cannot take cognizance of such foreign municipal law. Such foreign law must be made known to the courts here, by pleading the same as a substantive allegation of fact. There is a wide difference between rights acquired by contract and those conferred by an office, itself the creation of law, and having none but by particular law. The character of executor as well as that of an administrator, and the rights and duties of the office are regulated, in each country, by positive laws which may and do differ in different systems of law, and it is impossible for the court here to assume what the law of any foreign country may be. The court here, may, as an accident, be acquainted with the law of England or of France, on this subject, but is not judicially and necessarily so, and that knowledge would not in fact exist, with reference to some countries such as Russia or India, with which we might be placed in relations similar to those arising in this case. And, although it is beyond the inquiry necessary to this case, if the law of England be referred to on the present subject, it will be found that, actually, the executor could not have brought this action in Ireland, which rests in its entirety in the surviving partner, and that the executrix, Maria Grainger, is claiming to exercise, in Canada, rights which she has not in the country of her appointment, when, by express enactment of our legislature, her rights in Canada are only coextensive with those she could exercise there, and in the absence of that statute, she would be without any capacity whatever to sue in Canada. As regards Defendant, he

(1) 5 Toullier, nos 343, 344.

(2) 2 Kent's Commentaries, p. 534, in note.

has a manifest interest in being informed of the nature of the rights of Plaintiff in this respect, in order that he may, if necessary, raise issue upon them, and in order to be satisfied that he may not be exposed to a second claim from those in whom the right may really lie. The Statute 22, Vic. ch. 6, places the position of Respondent in the clearest possible light, and conclusively makes it necessary to show the seizin of the estate, and the particular rights of the executor by the law of the country where they were acquired, and the transmission, by operation of that law, of the rights of action of the testator's succession to his executor if such rights of action exist in the executor, and, in this case, they do not. It is to be remarked also, in support of the position that the United Kingdom is to be treated as a foreign country, that the statute quoted places Upper Canada itself in that category.

Sir L. H. LaFontaine, Brt., C. J.: I differ from the majority of the court. The promise alleged to have been made by Deféndant to the executrix, is invalid, because it is not shewn by the declaration, that, by the law of Ireland, the executrix had power to receive such promise.

Duval, Justice: I dissent also, because I hold that a foreign law ought to be treated as a matter of fact, and must be proved; and, consequently, the promise to pay the executrix must be supported by evidence to shew that, as executrix, she had power, by the law of Ireland, to receive it. The undertaking, therefore, to pay her, is a mere *nudum pactum*, and is not binding, and the judgment appealed from is consequently in my opinion correct. The statute invoked does not apply in this case, because it only gives the executrix a right of action, in cases where she would possess it in her own country.

Badgley, Justice: The rights of an excentrix, under a will, are recognised all the world over by the common law, she sues under and in virtue of the will. I concur in reversing the judgment below.

Mondelet, Justice: Without deciding whether there would have been, without the special allegation of indebtedness and promise to pay, *bien ou mal jugé*, it is to be observed that, in the declaration, there are special, formal and distinct allegations, that Defendant acknowledged and promised Plaintiffs (executors and administrators) to pay them the very sum of money claimed by them in an by their declaration, thereby acknowledging their capacity, and Defendant's indebtedness. How could the Superior Court, therefore, dismiss the action? No more than it could be done in the case of *Gugy* and *Sutherland*, a decision of the Superior Court at Montreal, and which was confirmed by the Court of Appeals, where an application was made for an appeal from the interlocutory judg-

ment rendered in the Superior Court, dismissing the *défense en droit*, and was, *à l'unanimité*, refused. I am, therefore, of opinion that the judgment of the Superior Court should be reversed, leaving the parties to be dealt with, by the Superior Court, as to law and justice will appertain; or this court might give the judgment which the court below ought to have rendered, viz: *avant faire droit*, ordering the parties respectively to adduce evidence.

AYLWIN, Justice: The grounds of the demurrer ought to have been urged by an *exception à la forme*. The promise of Defendant to pay, was not, as appears by the declaration, made in Ireland, but in Quebec, it is difficult, therefore, for me to see how a demurrer would lie at all. The statute invoked makes no change at all in the law as regards the rights of executors, it merely provides for the recognition of their existing rights. There is no necessity to prove the law of Ireland, the principle is, that, if the law of a foreign country be not proved the Court must be governed by the law of Canada. Besides, as to a portion of the debt it was contracted in Canada, where the Respondent also recognised the power and quality of the executrix. Is it consistent, therefore, that this man should receive the woman's money and when called upon to pay, deny her right to receive it?

Judgment reversed. (10 *D. T. B. C.*, p. 350.)

AUSTIN, for Appellant.

ANDERSON and PARKIN, for Respondent.

EXECUTION.—OPPOSITION.

BANC DE LA REINE, EN APPEL, Montréal, 3 septembre 1860.

Présents: Sir L. H. LAFONTAINE, Bart., Juge-en-Chef, AYLWIN, DUVAL et MONDELET, Juges.

FOURNIER, Appelante, *et* RUSSEL, Intimée.

Jugé: 1° Qu'un créancier exécutant doit inscrire au dos du bref d'exécution ce qu'il a reçu en déduction du jugement, et que l'opposition du Défendeur fondée sur cette omission doit être maintenue avec dépens. (1)

2° Que la cour ne peut prendre connaissance de moyens d'opposition, qui avaient déjà été invoqués par une précédente opposition, et sur lesquels la cour avait prononcé. (2)

L'Intimée, sur jugement qu'elle avait obtenu contre l'Appelante, en qualité de tutrice à ses enfants, avait fait saisir les biens de ces derniers, et, la vente en ayant été suspendue par

(1) V. art. 581 et 653 C. P. C.

(2) V. art. 588*a* et 664 C. P. C.

divers incidents et ces incidents jugés, l'Intimée fit émaner un bref d'*alias venditioni exponas*, en date du 21 décembre 1858. L'Appelante s'opposa à la vente, alléguant l'absence d'un ordre de la cour pour procéder sur *venditioni exponas ;* le refus du shérif de procéder à la vente des lots dans l'ordre indiqué par l'Appelante ; le défaut de publication dans la *Gazette du Canada ;* l'émanation du bref pour la totalité du jugement, pendant que l'Intimée avait un transport d'une somme considérable due à l'Appelante par un nommé Charlebois, et qui avait été portée au crédit de l'Appelante dans des états de créance préparés par les agents de l'Intimée ; et, enfin, un paiement de £200, fait en déduction du jugement le 5 mars 1858. Les conclusions tendaient à surseoir à la vente, à faire déclarer tous les procédés sur le bref d'*alias venditioni exponas* irréguliers et non avenus, et, subsidiairement, à ce qu'il fût enjoint de ne prélever que la balance restant, après déduction du transport, et des £200. L'Intimée répondit en niant les allégations de l'opposition, et en invoquant un jugement du 20 décembre 1857, qui déboutait une opposition contenant les trois premiers moyens, et cette partie du quatrième fondée sur le transport de la dette de Charlebois. La Cour Supérieure, le 31 mai 1859, rendit le jugement suivant : " The court considering that the sum of £200 " was received and taken to account by Plaintiff, after the issue " of the *alias* writ of *venditioni exponas*, on the twenty-eighth " day of January, 1858, and before the sale and adjudication of " the real estate advertised for sale and *décret*, at the suit of " Plaintiff; and considering that the other grounds set forth by " Opposant in her said opposition and *moyens*, have been set " out in her previous opposition and *moyens* in this cause filed, " and been legally and judicially passed and determined upon, " doth maintain the opposition, but without costs, and to the " effect only of suspending the operation of the seizure and sale " of the real estate of Defendant, with the view to the reduc- " tion of the amount to he levied at the suit of Plaintiff by the " amount of the sum of two hundred pounds, with interest " thereon from the fifth day of March, 1858, and the court doth, " in consequence, order that, in any future levy, at the suit of " Plaintiff, on the lands and tenements of Defendants, credit " be allowed and given to Defendants for the sum of two " hundred pounds, with interest as aforesaid." La Cour d'Appel a réformé ce jugement quant aux dépens seulement, ainsi qu'il est exprimé dans le motivé dont suit copie : " considérant que, dans le jugement dont est appel, il y a bien jugé, excepté en ce qui regarde les dépens de l'opposition ; que, si l'Intimée, Demanderesse en cour de première instance, n'a pas été, par le dit jugement, condamnée aux dépens de l'opposition de l'Appelante, c'est évidemment en conséquence d'une erreur de fait

commise par la cour de première instance, qui a donné au *venditioni exponas*, dont il s'agit, la date du 28 janvier 1858, tandis que ce bref n'a été réellement émané que le 21 décembre 1858 ; que, par conséquent, la somme de £200 courant, mentionnée au jugement comme ayant été reçue par l'Intimée a été reçue par elle avant l'émanation du bref de *venditioni exponas*, et non après cette émanation, ainsi qu'il est erronément énoncé au jugement ; que, pour cette raison, l'Intimée aurait du être condamnée aux dépens de l'opposition : et que, partant, il y a lieu de réformer le jugement à cet égard, mais à cet égard seulement : confirme le dit jugement, excepté en ce qu'il ne condamne pas l'Intimée à payer à l'Appelante les dépens de son opposition ; et, cette cour procédant à réformer le jugement, à cet égard, condamne l'Intimée à payer à l'Appelante les dépens de son opposition en la Cour Supérieure, et, de plus, condamne l'Intimée aux dépens du present appel. (10 *D. T. B. C.*, p. 367.)

OUIMET et MORIN, pour l'Appelante.
ROBERTSON, A. et W., pour l'Intimée.

TIERCE OPPOSITION.—PRESCRIPTION.

BANC DE LA REINE, EN APPEL, Montréal, 7 septembre 1860.

Présents : Sir L. H. LAFONTAINE, Bt, Juge-en-Chef, AYLWIN, DUVAL, MONDELET et BADGLEY, Juges.

THOUIN, Appelant, *et* LEBLANC et al., Intimés.

Jugé : 1° Qu'uue personne dont les intérêts se trouvent affectés par un jugement, dans une instance à laquelle elle n'était pas partie, peut se pourvoir par tierce-opposition, ou par action directe contre ce jugement, à l'effet de se faire maintenir dans tous ses droits. (1)

2° Qu'un acquéreur qui a été mis en possession d'un immeuble, et a depuis fait inscrire son titre, peut opposer la prescription et possession de dix ans, à un acquéreur inscrit précédemment, mais qui n'a pas eu possession de l'immeuble. (2)

L'action sur laquelle est intervenu le jugement dont était appel avait le caractère d'une tierce opposition. Par sa déclaration, Thouin, le Demandeur, alléguait que, le 8 juillet 1843, Frs Pellerin avait obtenu des *lettres patentes* lui octroyant la moitié du lot No 12, dans le premier rang de l'augmentation du township de Kildare, contenant 100 acres, plus ou moins ; que, le 20 mars 1846, par acte devant Bourgeois, notaire, Pellerin lui avait vendu $3\frac{1}{2}$ arpents de terre de front, sur $20\frac{1}{2}$ arpents de profondeur, étant partie du demi-lot

(1) V. art. 510 C. P. C.

(2) V. art. 2098 et 2251 C. C.

de terre en question ; qu'il en avait pris immédiatement possession, et que son acte d'acquisition avait été enrégistré le 7 juillet 1847 ; et que, le 10 août 1855, l'Appelant avait vendu ce terrain à Léon Pellerin, sous les réserves mentionnés en l'acte reçu devant Bourgeois, notaire ; que le 17 juin 1857, Léon Pellerin lui avait rétrocédé ce terrain, et qu'il en était ainsi devenu propriétaire ; qu'il avait possédé ce terrain de bonne foi, sans trouble ni inquiétation, à titre de propriétaire, pendant dix ans et plus, entre présents, âgés, et non privilégiés, avant le 12 mars 1857, et qu'il avait ainsi acquis par prescription la propriété du lot de terre en question ; que pendant sa possession, il avait fait, sur cet immeuble, des impenses qui en avait augmenté la valeur d'au moins $300 ; que Leblanc, un des Défendeurs-Intimés, avait obtenu, le 12 mars 1857, jueement contre Frs Pellerin, à l'effet de se faire mettre en possession de la susdite moitié du lot No 12, et ce sans avoir mis Thouin en cause. Thouin concluait, en conséquence, à être reçu tiers-opposant au jugement du 12 mars 1857, quant à la partie du lot par lui acquis, demandant d'être maintenu en la possession d'icelui, qu'il fût fait défense au Défendeur Leblanc de l'y troubler, en exécutant le jugement du 12 mars 1857, du moins, sans, au préalable, lui rembourser ses impenses et améliorations, avec intérêt et depens. Pellerin, assigné avec Leblanc, ne comparut pas, et Leblanc plaida que Thouin n'avait aucun titre valable à la propriété ; que, lors de l'acte de vente du 20 mars 1846, consenti par Thouin à Pellerin, il n'était pas propriétaire du lot No 12, l'ayant précédemment vendu à Leblanc, par acte du 10 mars 1841, déclaré par le jugement du 12 mars 1857, rendu par la Cour du Banc de la Reine, siégeant en appel, être une véritable vente, et qui avait été enregistré le 23 octobre 1844. Que, d'ailleurs, Thouin ne pouvait invoquer la possession de bonne foi, ayant eu connaissance de la vente faite à Leblanc, ainsi que de la poursuite de ce dernier contre Frs Pellerin. Leblanc alléguait de plus fraude, de la part de Thouin, et niait son droit aux impenses. Par une autre exception, Leblanc opposait à la demande d'impenses, les fruits perçus par Thouin. La Cour Supérieure prononça le jugement suivant : " Considérant que " les allégués de la déclaration du Demandeur ne sont pas prou- " vés ; considérant, de plus, que, par la loi, pour pouvoir ac- " quérir la propriété d'un héritage, par la prescription de dix " ans, il faut que ce soit une possession à juste titre et de bonne " foi ; considérant qu'il n'est pas prouvé que la possession du " Demandeur des immeubles qu'il reclame par sa présente " demande, ait ces qualités ; considérant aussi que, dans l'es- " pèce, le Demandeur n'a pas droit au remboursement des im- " penses qu'il réclame, déboute le Demandeur de sa demande."

Au soutien de l'appel, Thouin soutenait : 1° que le jugement du 12 mars 1857, affectant ses intérêts, lui, Thouin, avait droit d'y former la tierce opposition ; 2° qu'il pouvait former cette tierce opposition au moyen d'une action directe ; (1) 3° que lui Thouin ayant été mis en possession du terrain en question, devait être préféré à Leblanc qui n'avait eu aucune tradition ; (2) 4° qu'il suffisait que Thouin eût commencé à posséder de bonne foi, et que la mauvaise foi ne pouvait résulter que de la connaissance des titres ; (3) 5° qu'en supposant même que sa possession eût été de mauvaise foi, Thouin avait droit à ses impenses. (4) L'Intimé s'appuyait sur l'inscription de son titre comme équivalant à une tradition, et lui donnant la préférence sur l'Appelant, dont l'acquisition et l'inscription étaient postérieures, et invoquait l'autorité de Pothier, *Propriété*, n°s 28, 33, 34, 54, et de Troplong, *Traité de la prescription*, n° 927. Le jugement en appel est motivé comme suit : " 1° considérant que l'action de l'Appelant contre les Intimés procédait valablement ; que, le 8 juin 1843, le Défendeur, François Pellerin, a obtenu du gouvernement des lettres patentes lui octrayant la moitié nord-est du lot No 12, dans le premier rang de l'augmentation du township de Kildare, contenant cent arpents plus ou moins ; 2° considérant que le 20 mars 1846, Pellerin a vendu au Demandeur-Appelant, une partie du dit lot, savoir : trois arpents et demi, sur vingt-six de profondeur, duquel terrain ainsi à lui vendu, le Demandeur a immédiatement pris possession laquelle possession il a eue jusqu'au 10 août 1855, jour auquel il a fait cession à Léon Pellerin, qui lui a fait rétrocession le 17 juin 1857 ; que Léon Pellerin a possédé du 10 août 1855 jusqu'au 17 juin 1857, et que, depuis ce dernier jour jusqu'à l'introduction de la présente action, le Demandeur a, de nouveau, possédé le tout ; 3° considérant qu'il est établi que le Demandeur a possédé de bonne foi, sans trouble ni inquiétation, tant par lui-même que par Léon Pellerin, pendant dix ans et plus, avant le jugement ci-après mentionné, et que, par conséquent, il a, de plus, acquis par prescription le dit lot de terre ; 4° considérant qu'au jugement du 12 mars 1857, dont il est question en cette cause, ni Thouin ni Léon Pellerin n'étaient parties ;

(1) 4 Carré et Chauveau. pp. 260, 261 ; Serpillon, sur l'art. 10, tit. 27 : Nouveau Pigeau, pp. 672, 675, 676.

(2) Pothier, *Propriété*, no 326 ; *Vente*, nos 319, 321 ; Troplong, *Vente*, no 37 ; Louet, Lettre V, tom. 1, arrêt du 24 avril 1505 ; Delvincourt, t. 2, p. 656 ; Guyot, *Répert.*, vo Tradition, 2e col. ; vbo Revendication, p. 622, 1 col., 9 *al.*

(3) Guyot, *Répert.*, vbo Améliorations ; Dalloz, *Recueil alphabétique*, vo Prescription, t. 11, p. 289.

(4) Laurière, sur art. 111 ; Troplong, *Prescription*, n°s 584, 585, 930, 931 ; Brodeau, sur art. 113, pp. 160, 161 ; Ibid., sur art. 114 ; *Journal du palais*, t. 2, p. 510, arrêt du 18 mai 1684 ; art. 417 C. C.

que, par conséquent, Thouin est bien fondé à se porter tiers-Opposant à son exécution, quant à ce qui a rapport au lot de terre, dont il a la propriété et la possession ; que, partant, dans le jugement de la cour de première instance qui le déboute de sa demande, il y a mal jugé : infirme le jugement rendu le 30 juin 1859, par la Cour Supérieure siégeant à Montréal ; et cette cour, procédant à rendre le jugement que la Cour Supérieure aurait dû rendre, reçoit le Demandeur-Appelant tiers Opposant à l'exécution du jugement du 12 mars 1857, quant à ce qui a rapport au lot de terre désigné en second lieu dans la déclaration, et à tous les droits qu'il a acquis par les actes du 20 mars 1846, et du 17 juin 1857, le maintient dans la possession du dit lot de terre et de tous les susdits droits ; fait défense à Jean-Baptiste Leblanc de l'y troubler, soit en exécutant le jugement du 12 mars 1857, ou de toute autre manière : déclare le présent jugement commun aux deux Défendeurs-Intimés. (10 *D. T. B. C.*, p. 370.)

DORION, DORION et SENÉCAL, pour l'Appelant.

OUIMET et MORIN, pour l'Intimé.

ACTION EN SEPARATION DE BIENS.

BANC DE LA REINE, EN APPEL, Montréal, 3 septembre 1860.

Présents : Sir L. H. LAFONTAINE, Baronnet, Juge-en-Chef, AYLWIN, DUVAL et MONDELET, Juges.

MARCHAND, Appelant, *et* LAMIRANDE, Intimée.

Jugé : Qu'un créancier du mari ne peut contester la demande en séparation de biens portée par la femme, et ne peut intervenir sur cette demande que pour la conservation de ses droits. (1)

L'Intimée poursuivait son mari, Maurice Roman, à l'effet de faire prononcer la dissolution de communauté entre eux, et la séparation de biens, sous prétexte de l'insolvabilité du mari, de la vente de ses meubles sur exécution, et de la capacité de l'Intimée de subvenir à ses besoins et au soutien de ses enfants. Elle n'alléguait pas qu'elle eût aucune reprise à exercer contre son mari. La cause procédait *ex parte*, et l'enquête de la Demanderesse était terminée, lorsque l'Appelant produisit une requête en intervention, alléguant qu'il était créancier du Défendeur ; que l'action n'avait pour but que de frustrer les créanciers du mari, et faire tomber, au moyen de la séparation de biens, tout l'actif du mari en la possession de la femme. Les conclusions étaient dans les termes suivants : " Pourquoi, votre requérant vous prie de lui permettre d'in-

(1) V. art. 975 C. P. C.

tervenir en cette cause, et d'y prendre tels procédés qu'il avisera *pour se protéger*, et que tous les procédés adoptés par la Demanderesse soient suspendus ; et à ce qu'il soit permis au requérant de contester l'action, s'il le croit à propos, sous tel délai qu'il plaira à cette cour de fixer." L'Intimée contesta cette demande en intervention, en niant toutes les allégations contenues en la requête, sauf l'existence des billets du mari qui constituaient la créance de l'Appelant et concluait au renvoi de l'intervention. La Cour Supérieure par son jugement du 31 octobre 1859, vu que la Demanderesse avait prouvé les allégations principales de sa demande, prononça la séparation de biens ; et, considérant que l'Intervenant n'avait pas établi, en droit, ou par la preuve des faits mentionnés en sa déclaration, que la Demanderesse dût être déboutée de sa demande, renvoya l'intervention. L'Appelant se pourvut contre ce jugement, en représentant que comme créancier du mari, il avait droit d'intervenir pour surveiller la procédure, et protéger ses droits, au cas où l'Intimée aurait prétendu exercer quelques reprises, ou même accepter la communauté, ainsi qu'elle pouvait le faire en vertu du jugement de séparation et qu'ainsi c'était à tort qu'on l'avait mis hors de cause. Que, d'ailleurs, quoiqu'il n'eût pas produit de contestation à l'encontre de la demande, néanmoins la preuve faite par la Demanderesse ne justifiait pas l'octroi de la séparation. La Cour d'Appel a confirmé le jugement de la Cour Supérieure, n'y trouvant pas *mal jugé;* elle a réservé seulement à l'Appelant " le droit d'intervenir de nouveau pour surveiller ses " droits, s'il le juge à propos," et l'a condamné aux dépens. (10 *D. T. B. C.*, p. 375.)

OUIMET ET MORIN, pour l'Appelant.

BATES, J. et W. A., pour l'Intimée.

PEREMPTION D'INSTANCE.—DEPENS.

SUPERIOR COURT, Quebec, 6 septembre 1860.

Before TASCHEREAU, Assistant-Judge.

TURNER, Plaintiff, *vs.* LOMAS, Defendant.

Jugé: Que dans les cas où la péremption d'instance est déclarée acquise, il ne sera accordé aucuns dépens. (1)

PENTLAND, for Defendant, moved for *péremption d'instance,* no proceedings having been had within three years, and prayed for costs. Several members of the bar suggested to the

(1) *Gore* vs. *Guggy*, 6 *R. J. R. Q.*, p. 57, et art. 460 et 478 C. P. C.

Court, the propriety of establishing some definite rule, with respect to the granting of costs, in cases of *péremption d'instance,* and thereby terminate the varied practice which had hitherto obtained, that of granting costs in some cases, and not in others; and stated that, in the district of Quebec, the practice had generally been not to grant costs, while, in the district of Montreal, the reverse appeared to be the general rule; and that, in a recent case, the Court of Appeals had decided, that it was discretionary with the courts to grant or refuse costs in such cases, and that the exercice of that discretion either way, would not be disturbed in appeal.

TASCHEREAU, Juge: Ayant consulté mon confrère, M. le Juge STUART, nous en sommes venus à la conclusion de suivre, dans le cas de *péremption d'instance,* la pratique qui a prévalu dans le district de Québec, et de ne pas accorder de frais. La Cour d'Appel, dans la cause citée, a seulement décidé qu'il était dans la discrétion de la Cour Supérieure d'accorder ou de ne pas accorder de frais en pareil cas, sans se prononcer sur la question de savoir si les frais devaient être accordés; et, sous ces circonstances, nous ne voyons aucune raison pour changer la pratique qui a déjà prévalu à Québec, celle de ne pas accorder de frais en cas de *péremption d'instance,* et nous suivrons cètte décision à l'avenir, dans le cas où la *péremption d'instance* est demandée. La motion est conséquemment accordée, mais sans frais. (10 *D. T. B. C.*, p. 382.)

JONES, for Plaintiff.

PENTLAND and PENTLAND, for Defendant.

DELAI.—MOTION.—SIGNIFICATION.

SUPERIOR COURT, Québec, 3 septembre 1860.

Before TASCHEREAU, Assistant-Judge.

BYRNE *et al.*, Plaintiffs, *vs.* FITZSIMMONS, Defendant, *and* Fisher, Opposant.

Jugé: Que les motions pour permission d'examiner des témoins sur le point de laisser la Province, ne tombent pas sous l'opération de la 11e règle de pratique; et qu'un avis de telle motion, signifiée un samedi est suffisant pour la production de telle motion le lundi. (1)

IRVINE, for Plaintiff, moved for leave to examine a witness immediately about to leave the Province, upon Plaintiff's con-

(1) This rule provides, "That, in computations of time, no fractions of a day be allowed, nor shall any Sunday or binding holiday (*fête d'obligation*) be reckoned, unless otherwise provided for by law."

testation of the opposition of Fisher; issue not having then been joined.

POPE, R., for Opposant, contended that the motion could not be entertained, inasmuch as the delay of a day, as required by the 55th rule of practice, had not intervened between the service of the notice and the presentation of the motion; that notice had merely been served upon him on Saturday, the 1st September, and the motion was presented on Monday the 3rd; and that this delay was insufficient, under the 11th rule of practice above referred to.

TASCHEREAU, Justice: Motions for leave to examine witnesses about to leave the Province, are excepted from the operation of the 11th rule of practice, and the notice given in this case is therefore sufficient; but, inasmuch as the Opposant has requested an affidavit in support of the motion, and Plaintiffs assert that it has since come to their knowledge that the witness has left the Province, the motion must be discharged. (10 *D. T. B. C.*, p. 383.)

HOLT and IRVINE, for Plaintiff.

POPE, R., for Opposant.

PROCEDURE.—RENVOIS.—RATURES.

COUR SUPÉRIEURE, Québec, 6 septembre 1860.

Présent: TASCHEREAU, Juge-Assistant.

BLACKISTON *vs.* ROSA.

Jugé: Qu'une exception à la forme qui contient des ratures et des renvois auxquels il n'est pas référé au bas du plaidoyer, est néanmoins valide.

LANGLOIS, de la part du Demandeur, fit motion pour faire rejeter *l'exception à la forme* du Défendeur, parce qu'elle contenait plusieurs renvois qui n'étaient pas approuvés ni mentionnés au bas de *l'exception* comme bons; et parce qu'elle contenait des mots rayés qui n'étaient pas mentionnés au bas de *l'exception* comme nuls.

BOSSÉ, junior, maintint qu'il n'était pas nécessaire de mentionner les renvois ou mots rayés au bas de l'exception. (1)

TASCHEREAU, Juge: Il n'y a rien dans la loi qui rende nécessaire de mentionner les renvois ou mots rayés au bas de *l'exception;* et les objections aux *exceptions à la forme* doivent être faites sur le mérite, et non par des objections futiles. (10 *D. T. B. C.*, p. 399.)

CASAULT et LANGLOIS, pour le Demandeur.

BOSSÉ et BOSSÉ, pour le Défendeur.

(1) 8 *R. J. R. Q.*, p. 129.

CAUTIONNEMENT EN APPEL.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 20th September, 1860.

Before Sir L. H. LAFONTAINE, Bart., C. J., and AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

HEARN, Appellant, *and* LAMPSON, Respondent.

Jugé : 1° Qu'il n'y a pas d'appel à la Cour du Banc de la Reine sous les dispositions de la 12e Vic., ch. 38, secs. 53, 95 ; 18 Vic., ch. 108, sec. 15 ; et de la 20 Vic., ch. 44, sec. 60, dans une action pour vider les lieux instituée devant la Cour de Circuit, où le loyer est au-dessous de £25. (1)

2° Que lorsque le cautionnement est donné par deux cautions sur appels à la Cour du Banc de la Reine, de la Cour de Circuit, il n'est pas nécessaire que l'une ou l'autre déclare qu'elle est propriétaire de biens immeubles de la valeur de £50, au-dessus de toutes charges, et que cela devient nécessaire seulement dans le cas où le cautionnement est donné par une seule caution, en vertu de la 20e Vic., ch. 44, secs. 61 et 62. (2)

The Respondent obtained judgment in the Circuit Court, in an action of ejectment, compelling Appellant to deliver up possession of the property held by him from Respondent, in virtue of a lease at the rate of £15 per annum, the term of the lease having expired. The Appellant having appealed, Respondent moved to reject the appeal.

KERR, for Respondent : The annual value or rent being £15 determines the jurisdiction of the case to be in the Circuit Court, and there is no appeal from any judgment of the Circuit Court, to this court, where the amount in contestation is under £25 (3). Besides, in this case, there is no sum in contestation whatever ; Respondent claimed no rent by his action in the court below, he merely sought to obtain possession of the premises then in the occupation of Appellant, the term of the lease having expired and the rent having been paid. There is consequently no right of appeal. The appeal must be dismissed, secondly, because Appellant has not put in sufficient security, as required by law ; the bond is signed by two sureties, neither of whom is declared to be a proprietor of real property of the value of £50 over and above all incumbrances, as required by law (4) : [illegible] pretension being that one must be declared to be such proprietor.

DUVAL, Justice : There has been a decision against you : the question has already come up before this court, both here and

(1) V. art. 1142 C. P. C.

(2) V. art. 1122 C. P. C., et 1939 et 1962 C. C.

(3) 12 Vic., cap. 38, secs. 53 and 95 ; 18 Vic., cap. 108, sec. 15 ; 20 Vic., cap. 44, sec. 60.

(4) 20 Vic., cap. 44, secs. 61 and 62.

at Montreal, and all the judges have given these two clauses great consideration, and we have come to the conclusion that it is not necessary that it should appear that one of the sureties is the proprietor of immoveable property, when there are two sureties.

Sir L. H. LaFontaine, Chief-Justice : We have already held that, where there are two sureties, it is not necessary that a description of the property should be given.

Jones, for Appellant : The appeal does lie to this court, under the act cited, 18 Vict., cap. 108, sec. 15. The proper interpretation of this clause is, that the appeal lies to this court from the Circuit Court, as well as from the Superior Court, but, when once brought, it is then subject to all the rules and conditions to be observed in the case of appeals from other judgments of both these courts.

Aylwin, Justice : The 18 Vic., cap. 108, sec. 15, provides that all appeals from the Circuit Court, under that act (Lessor and Lessee Act) shall be to the Superior Court, and not to this court : and the 20 Vic., cap. 44, sec. 60, provides that appeals from the Circuit Court shall only lie to this court where the amount in dispute is £25 or upwards, or where any sum of money is payable to Her Majesty, fee of office, &c., now this case is not comprehended by this clause, because there is no fee of office, or money due to Her Majesty, in question. The motion to reject the appeal is therefore granted, and the appeal dismissed. (10 *D. T. B. C.*, p. 400.)

Jones and Hearn, for Appellant.

Kerr and Campbell, for Respondent.

CAUTIONNEMENT EN APPEL.

Queen's Bench, Appeal Side, Quebec, 13 septembre 1860.

Before : Sir L. H. LaFontaine, Bart., C.-J., Aylwin, Duval, Meredith and Mondelet, Justices.

Gibb et al., Appellants, *and* The Beacon Life and Fire Assurance Company, Respondents.

Les Intimés servirent un avis sur le procureur des Appelants qu'ils donneraient caution, sur appel au Conseil Privé, le samedi 18 août, en la chambre des juges au Palais de Justice. Le cautionnement ne fut pas fourni ce jour, mais avis fut donné le samedi que le cautionnement serait fourni en chambre le lundi. Le cautionnement fut donné ce jour, non pas en chambre, mais à l'hôtel du juge; l'une des cautions ayant signé le cautionnement dans l'avant-midi, et l'autre l'après-midi :

Jugé : Sur motion pour faire mettre de côté le cautionnement comme irrégulier et donné sans avis suffisant, que le cautionnement devait

suffire, mais permettant aux parties intimées de faire telles objections à la suffisance du cautionnement, qu'elles auraient pu légalement faire lorsqu'il fut fourni. (1)

The Respondents served a notice upon the attorney of Appellants that they would put in security in appeal to Her Majesty in Her Privy Council, in chambers, on Saturday, the 18th August. Security was not put in on this day, but, later in the day, Respondents gave notice to Appellant's attorney, that security would be put in, on Monday, the 20th, in chambers. Security was on this day put in, not in chambers, but at the Judge's private residence, where one of the sureties signed the bond in the forenoon, and the other in the afternoon.

VANNOVOUS, now, moved to set aside the bail-bond, on the ground, firstly, of the want of sufficient notice, inasmuch as the notice left at his office, even if regularly served, on the Saturday, was not sufficient notice for the Monday; that it did not appear by the record that any notice whatever had been served upon him on the Saturday; and that there was no bailiff's return of record, shewing that any service of notice had ever been made upon him on Saturday; and, secondly, by reason of the irregular manner in which the security had been put in, it not having been put in, in chambers, but, on the contrary, at the Judge's private residence, and also by reason of the irregular manner in which the sureties had there signed the bond, one having signed in the forenoon, and the other in the afternoon.

HOLT, *contrà*, said: That, Saturday, the 18th August, being the day on which His Royal Highness the Prince of Wales, arrived in Quebec, all business was in consequence suspended, and that it was for this reason that he was unable to put in the security on that day, and the same reason prevented him from being able to procure a bailiff to make the service of notice on that day for the Monday, the day on which security was put in; but that he could establish by affidavit that a notice had been left at the office of the attorney of the adverse party on the Saturday afternoon for the Monday. For these reasons, and also from the circumstance that the judgment sought to be appealed from was one in which the judges of this court were equally divided, he hoped that the court would overlook the apparent irregularity, considering that there had been no remissness on the part of Respondents to comply with the formalities in such cases provided, but that they had been prevented from doing so by obstacles beyond their control.

DUVAL, Justice: The court thinks that the equity of the

(1) V. art. 1121 et 1122 C. P. C.

case will be best met by allowing Mr. Vannovous to make such objections to the sufficiency of the security, as he might legally have made, on Monday, the 20th August, the day on which the sureties signed the bond, but the bond itself must remain. (10 *D. T. B. C.*, p. 402.)

VANNOVOUS, for Appellants.

HOLT and IRVINE, for Respondents.

BIGAMIE.

QUEEN'S BENCH, APPEAL SIDE,

Québec, 20 septembre 1860.

Before: Sir L. H. LAFONTAINE, Bart., C. J., AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

REGINA *vs.* CREAMER.

Jugé: 1° Que, sur procès pour bigamie, l'admission du premier mariage par l'accusé, sans autre témoignage corroboratif, est suffisante pour soutenir une conviction. (1)

2° Que, sur procès pour une offense criminelle, les autorités américaines ne seront pas reçues.

3° Qu'un soldat convaincu de bigamie n'est pas, par là, libéré de ses engagements militaires.

The prisoner, a private in the Royal Canadian Rifles, was tried before DUVAL, Justice, at the June term last past, of the Court of Queen's Bench (Crown Side) for bigamy, in having married *Ellen Maloney*, on the 18th October, 1859, his first wife, *Maria Gilthrop*, being then living. At the trial the prisoner pleaded *not guilty*. It was proved that a sergeant in the prisoner's regiment, accompanied by a woman representing herself as *Maria Gilthrop*, went to the prisoner, on the 7th May, 1859, and the sergeant, pointing to this woman, asked the prisoner: "Is this woman your lawful wife?" The prisoner answered: "Yes, she is, I'll never deny her." Subsequently, at the examination, before the magistrate, and, after the prisoner had heard the evidence adduced against him, the magistrate put the following question to him: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything, unless you desire to do so; but, whatever you say will be taken down in writing, and may be given in evidence against you, at your trial?" The prisoner replied, I am guilty of the charge, and *Maria Gilthrop* is my lawful wife; I was married to her, on the 24th June, 1852, at Dublin, Ireland, in the protestant church of the parish of St. James,

(1) V. art. 275 et 276 Code Criminel.

"by the Revd. Mr. McNeill; I was born in the city of Limerick, and I am a british subject." The marriage of the prisoner with *Ellen Maloney* was proved to have been celebrated in the St. Patrick Church, at Quebec, on the 18th October, 1859, by the Revd. B. McGauran, a roman catholic priest. The prisoner's counsel objected, firstly, that there was no legal evidence of the first marriage, secondly, that there was no legal evidence that *Maria Gilthrop* was alive when the second marriage was celebrated. With respect to the second objection, the learned Judge left it to the jury to decide as a question of fact. With regard to the first, he told them he was of opinion that the evidence was sufficient, but that he would reserve the objection for the opinion of the Judges of the Court of Queen's Bench. The jury returned a verdict of guilty. The Judge respited sentence, in order to take the opinion of the Judges of this court upon the question: Whether the admission of the prisoner was sufficient evidence of the first marriage? In the September term of the court, the question was submitted for the consideration of the Judges.

KERR, for the prisoner, argued: The admission of the prisoner, unsupported by other testimony, is not sufficient evidenee of the first marriage. (1) I also refer to Archbold's Practice and Pleading, p. 611, where a number of american cases are referred to.

AYLWIN, Justice: No reference to American authorities in such a case as this need be made; we will not look at such authorities.

Sir L. H. LAFONTAINE, Bart., Chief-Justice: Suppose the man was convicted upon american authorities, would the government, upon the presentation of a petition on behalf of the prisoner representing this fact, consider it advisable to carry out the sentence.

MONDELET, Justice: I entirely concur in the view taken by the learned Chief-Justice.

DUVAL, Justice: I am glad to find that the court has refused to receive american authorities, because I refused them myself in the case of the *Queen* vs. *Rudolph*, where the charge was for manslaughter. These foreign laws are inapplicable, and ought not to be received in criminal cases.

AYLWIN, Justice: I will shew the danger of referring to american authorities, in criminal cases. They hold in some of the States, as mentioned by Swift, one of the best american writers, that the evidence of a prostitute is illegal and inadmissible, on the ground of her being of unchaste cha-

Regina vs. *Flaherty*, 2 *Carrington* and *Kirwin*, p. 781; Taylor, *on Evidence*, p. 150, sec. 140.

racter. Is this law in England ? " In Missouri, the crime of rape is only a misdemeanor, even when committed by a slave, and rape by a slave is punished by castration. 2 Bishop on Criminal Law, No. 947. Even in the highly enlightened State of Massachusetts, adultery and fornication are indictable offences, larceny is punishable by a pecuniary mulct, the credit of a female witness may be impeached by showing that she is a common prostitute. 14 Massach. Reports, 387 ; Swift's Law of Evidence, 80 ; Aliter in New York, 13 Johnson, 504." Now, how can such laws, or the decisions founded upon them, be applicable in our Courts of Justice. I hope, therefore, we will hear no more of them. The practice of late has been to create great confusion, by the habit which has prevailed, to too great an extent, of citing american, english and french authorities, in all cases indiscriminately, and it is time to put an end to such confusion.

MEREDITH, Justice : I am quite of opinion, with the other Judges of this court, that, as a general rule, american authorities, in criminal cases, ought to be excluded : but in a case like the present, which is not regulated by positive law, and, in relation to which the opinions of some of the ablest english Judges are conflicting, I must confess I would not be disposed to exclude the reasoning of able legal minds, whether in the United States or elsewhere. It does seem to me that there are reasons for being more cautious in receiving admissions in a case of bigamy than in ordinary cases. The admission of a marriage involves a question of law ; and such admissions are not entitled to as much weight as admissions of matters of fact ; besides, a conviction for bigamy gravely affects the interests of the children of the second marriage. These are additional reasons to induce me to consult the american authorities in the present case ; and, as we all admit that on doubtful points we are glad to refer to these authorities in our studies, I see no objection to being aided in this reference by taking a note of them in court. At the same time, I repeat, when the english authorities are clear, I see no use whatever in citing any others.

AYLWIN, Justice : Besides, we have Lower Canada law upon the subject, a decision was rendered in Montreal, in which this very point came up, and was decided against the pretentions now urged on behalf of the prisoner ; (1) there is therefore no necessity for reference in the matter to american authorities.

STUART, Q. C., for the Crown : The point raised here has already been decided by this court, as His Honor Mr. Justice

(1) *Regina* vs. *McQuiggan*, 3 R. J. R. Q., p. 219.

Aylwin has justly observed. The prisoner made the admission upon which he was convicted, under the 14 and 15 Vic., cap. 96, sec. 10, and this admission is quite sufficient evidence to support the conviction, and has been frequently so held in England. (1)

AYLWIN, Justice : The authorities, at least the more recent ones, are clear upon the point ; that the admission of the prisoner, under the circumstances of this case, is sufficient to enable the Jury to say whether he is guilty or not. The admission was made freely and voluntarily, under the necessary precautions required by law, the prisoner was not entrapped into it. The objection may be urged, that the prisoner, being a soldier, might be disposed to make the admission, with the view of obtaining his release from his military engagements, but his conviction of the crime of bigamy will not have this effect. The question of the sufficiency of the prisoner's admission has, besides, been decided in Montreal as I stated at the argument, although it is not mentioned in the printed report referred to. In one word, the court here is of opinion that the verdict is right, and the sentence must be executed.

DUVAL, Justice : I had no doubt of the sufficiency of the admission at the trial, yet, I thought the objection was one which I ought to reserve for the opinion of this court ; but, if I had been aware of the decision rendered in Montreal, I would not have done so. The admission is of itself sufficient evidence to support the conviction. (2) The admission of the prisoner was not merely made to the Justice of the Peace, but, both before and afterwards, voluntarily to his comrades, and before the Justice of the Peace, he even gave the details, as to the church, &c., in which he was married. Now, an erroneous opinion appears to prevail that, by this conviction, the prisoner is discharged as a soldier. This is not so, (3) and I do not believe that the impression, that a conviction for bigamy releases a soldier from his military engagements prevails among military men.

MONDELET, Justice : It is a fundamental principle that the best evidence is the confession of the party accused, when such confession is made under proper circumstances, and there is no exception to this general rule which can be invoked in this case, to prevent the admission of the prisoner from being taken.

MEREDITH, Justice : The learned Judge, in submitting to the

(1) Greenleaf, p. 462, sec. 461 ; 1 Taylor, *on Evidence*, p. 358, sec. 384.

(2) Russell, *on Crimes*, p. 217.

(3) Prendergast, *on Law relating to officers in the army.*

Jury the admission made by the prisoner as to his first marriage, followed the course pursued by Mr. Justice Wightman, after consulting Mr. Justice Creswell, in the case of the *Queen* vs. *John Simonasto*, (1) and by Mr. Justice Erskine, in the *Queen* vs. *Upton*, referred to in the note to the *Queen* vs. *Simonasto.* Starkie also says: " I have known a prisoner to be convicted of bigamy, upon proof of his deliberate admission of both marriages, in the presence of his first wife, before a magistrate." (2) It is true that, in the *Queen* vs. *Flaherty*, relied on by the prisoner, Chief Baron Pollock held, that some evidence of the first marriage, beyond the mere admission of the prisoner, was necessary. But, the circumstances of that case were somewhat peculiar, and the Chief Baron observed that the prisoner might, " for a purpose have stated an untruth." In the present case, the admission was not only made deliberately, but, so far as I can see, without any motive to induce the prisoner to accuse himself falsely. The course pursued by the learned Judge in the present case, was not only in accordance with the english cases already referred to, but, also, with the decision of this court at Montreal (Mr. Justice Aylwin presiding), in the case of the *Queen* vs. *McQuiggan.* The reasons which have been urged against receiving admissions in cases of bigamy show, not that such admissions should be wholly rejected, but that they should be received with caution; and were they to be excluded, there can be no doubt that there would be a lamentable failure of justice in many cases. (10 *D. T. B. C.*, p. 404.)

KERR, for Prisoner.
SECRETAN, Counsel for Prisoner.
STUART, O., Q. C., for the Crown.

COMPETENCE.

COUR SUPÉRIEURE, Montréal, 29 septembre 1860.

Présent : BERTHELOT, J. A.

SENÉCAL *vs.* PACAUD et al.

Jugé : Qu'une dénonciation faite dans un district, et l'arrestation de l'accusé faite dans un autre district, lieu de sa résidence, donne droit à ce dernier de poursuivre en dommages le dénonciateur, dans le district où l'arrestation est faite, quoique le dénonciateur ne réside ni dans l'un ni dans l'autrs de ces districts.

The action was brought by Plainciff, described as residing at Verchères, against three Defendants, one of them, Pacaud,

(1) *Carrington* and *Kirwin*, 164 : 47 English Com. Law Rep., 164, in notes.

(2) 2 Starkie, *on Evidence* (3rd edition), p. 894.

described as of the township of Arthabaska, the two other Defendants as being of the city and district of Three Rivers. The allegations of the declaration changed Defendants with having falsely, maliciously, and without any reasonable or probable cause, made certain affidavits before a justice of the Peace, at the city of Three Rivers, on the 25th or the 26th April, 1859, charging Plaintiff, and Louis St. Louis, with obtaining money under false pretences, and, afterwards, of obtaining and procuring a true bill against him, at Three Rivers, on said charge, and with having falsely, maliciously, and without any reasonable or problable cause, on the 27th April, caused Plaintiff to be arrested, at the city of Montreal, and conveyed a prisoner to Three Rivers, under a bench warrant, from the Quarter Sessions there, where bail was given. That the case was removed from the Quarter Sessions to the Court of Queen's Bench, at Three Rivers, by *certiorari*, in which court Plaintiff was tried and found guilty, on the 12th September, 1859, and that, on a case reserved, the Court of Queen's Bench, appeal side, quashed and set aside the verdict and conviction, on the ground that Plaintiff had not been guilty of any offence. The declaration then set forth " that, by reason of the premises, " and of his unjust and unlawful arrest, at the city of Montreal, " he was forced and constrained to incur great expense " for bail, counsels' fees &c. £599, was injured in his reputation, in the district of Montreal and Richelieu, etc., to the extent of £4,500. Conclusion for £5,000. Pacaud pleaded by *exception déclinatoire* that the court had no jurisdiction, inasmuch as he had his domicile in another district, and had not been served with process within the limits of the district of Montreal, and that the cause of action had not arisen within the last named district, that, in no case, could the court have jurisdiction, except over facts alleged to have taken place in the district of Montreal. Conclusion, that the court declare it has no jurisdiction and dismiss the action as to him, and, subsidiarily, and, in case only that the foregoing conclusions were not granted, he prayed that it be declared, by the judgment, that he was only bound to answer that part of the action which rested on proceedings alleged as having taken place in the district of Montreal. The other Defendants pleaded the same pleas.

BERTHELOT, Justice, referred to the case of *Dansereau* vs. *Maxham* quoted below, (1) where a point similar to the one

(1) The notes taken, at the time of the rendering of the judgment were to the following effect : " SMITH, Justice : The Plaintiff, in this cause, is of Verchères Defendant resides at Quebec. The action is for malicious prosecution, and it is alleged that the affidavit was made at Quebec, and a warrant obtained from a justice of the peace there, which was indorsed, or backed, as it is called, in the district of Montreal, and the Plaintiff arrested at Verchères, within

before him had been raised, and the exceptions had been dismissed. He could not say he was fully satisfied with that judgment, but he felt bound to follow it, and the exceptions would be dismissed.

JUDGMENT: The court " doth dismiss the exceptions."

CARTER, for Plaintiff.

LAFLAMME, LAFLAMME and DALY, for Pacaud.

DORION, DORION and SENÉCAL, for Dumoulin and Frigon.

COMPENSATION.

BANC DE LA REINE, EN APPEL, Montréal, 3 septembre 1860.

Présents: Sir L. H. LAFONTAINE, Bart., Juge-en-Chef, AYLWIN, DUVAL, MONDELET et BADGLEY, Juges.

ARCHAMBAULT, Appelant, *et* ARCHAMBAULT, Intimé.

Jugé en Cour Supérieure: Qu'une créance qui n'est pas constatée par acte authentique ne peut être opposée en compensation à une autre créance constatée par un tel acte, nonobstant le défaut de la partie, à qui la compensation est opposée de répondre à l'articulation de faits de la partie plaidant compensation.

Jugé en Cour d'Appel: Que le défaut de la partie de répondre à l'articulation de faits, rendant les faits avérés, la créance opposée en compensation devenait claire et liquide, et éteignait la créance adverse. (1)

the district of Montreal, and taken to Quebec, where bail was given. The plea is a declinatory exception, to the effect that this court has no jurisdiction, the cause of action not having arisen within the district. We are against Defendant. The proceedings were begun at Quebec, but they were consummated in the district of Montreal, and this is enough.

MONDELET, Justice: I would say the proceedings were prepared at Quebec, and executed within the district of Montreal.

JUDGMENT, Superior Court: Montreal, SMITH, MONDELET, CHABOT, Justices, 27th June, 1857. " La cour a débouté et déboute l'exception déclinatoire."

In this cause, the declinatory exception was filed by Carter, and it appears, from the record, that pleas to the merits were put in, and a jury summoned, and that the trial was put off in September, 1858, since which date, no proceedings seem to have been had. Maxham's affidavit was to the effect that he had accepted Dansereau's draft, in favor of Louis St. Louis, for £200, on the false representation that he, Dansereau, had in his possession 2000 minots of barley which he would send down to Quebec for sale by Maxham. The declaration set up that security was given at Sorel, for his, Dansereau's appearance at Quebec, that he did appear before the magistrate there, and was discharged.

See 12 Vict., cap. 38, sect. 14." All actions, suits, or proceedings may be " commenced at the place where the terms of the said court are held in any " district, provided the cause of such actions, suits or proceedings respectively, " shall have arisen within such district, or the Defendant, or one of the " Defendants, or the party or one of the parties to whom the original writ, " order or process shall be addressed, shall be domiciled or served personally " with such writ, order or process within such district, and that all the Defen- " dants or parties aforesaid, be legally served with process, and not otherwise, " except when any of the said Defendants or parties shall be summoned by " advertisement as hereinafter mentioned."

(1) V. art. 1188 C. C.

L'Intimé, Demandeur en cour de première instance, poursuivait le Défendeur sur un acte d'échange d'immeubles intervenu entre eux, réclamant de lui £201 1 11, savoir : £25, partie de la soulte stipulée en faveur de l'Intimé, et à lui payable ; £21 16 8, restant de cette soulte que le Défendeur devait payer à l'acquit du Demandeur à un nommé Brazeau, paiement qui n'avait jamais été fait ; £25 à titre de dommages, faute d'avoir fait construire au Demandeur une maison en bois, ainsi que stipulé en l'acte d'échange ; £28 11 3, droits seigneuriaux dus sur la terre donnée en échange par l'Appelant et acquittés par l'Intimée, et £4-5 autres droits seigneuriaux dus sur la même terre, acquittés sur jugement par un nommé J.-Bte Surault à qui l'Intimé l'avait cédée, et que l'Intimé avait été obligé de rembourser. Le reste de la réclamation se composait d'intérêts sur ces diverses sommes L'Appelant contesta cette demande, alléguant extinction de la créance par paiement et compensation, et plaidant nommément paiement à Brazeau des £21 16 8 (ce qu'il ne prouva pas) et que, d'ailleurs, cette somme étant due à Brazeau par l'Intimé pour marchandises vendues et livrées, l'Intimé ne pouvait être troublé à ce sujet, cette créance étant prescrite. Il offrait au reste de donner à l'Intimé caution contre tout trouble à cet égard. L'Appelant disait avoir payé, sur transport fait par l'Intimé à un nommé Trottier, £10 8 4, et avoir payé au même une somme de £4 17 1½. Que sur la soulte, il ne restait ainsi qu'une balance de £9 14 4 ½, qui se trouvait compensée et au-delà, par celle de £37 15 10 que l'Intimé devait à l'Appelant, tant pour deniers et provisions avancés au Demandeur, que pour sommes payées à son acquit, prix d'un cheval et loyers de maison. Quant à la maison, l'Appelant n'avait jamais été mis en demeure de la construire, qu'il était prêt à le faire à l'endroit qu'on lui indiquerait, et qu'elle ne coûterait pas la somme demandée. Enfin, qu'il n'était pas tenu au paiement des prétendues créances seigneurialess ni tenu aux intérêts réclamés. Par sa réponse, le Demandeur prétendait que cette compensation invoquée par le Défendeur ne pouvait être accueillie, vu qu'elle était d'une créance non liquide, contre une créance claire et liquide. La contestation étant liée, l'Appelant produisit dans les délais prescrits une articulation de faits conforme à son exception. L'Intimé ayant négligé d'y répondre et de produire lui-même une articulation de faits, fit motion pour être relevé de ce défaut, mais sa motion fut rejetée, et, de ce jugement il n'y a pas eu appel. L'Intimé interrogea l'Appelant sur faits et articles, et les parties fixèrent d'un commun accord, à £9 la valeur de la maison en question. Par les faits et articles, l'Appelant admettait que la terre qu'il avait donnée en

échange devait au seigneur £17 12 6, mais que celle qu'il avait reçue devait £11 7 10 qu'il avait payés ; que l'Intimé avait été poursuivi en exhibition de titres, et non en recouvrement d'arrérages ; qu'il avait payé £14 0 4½ depuis l'institution de cette action, non pas à Brazeau, mais à son fils *pour balance de tout compte contre le Demandeur*. Le 28 octobre 1859, la cour présidée par l'hon. Juge Guy, rendit le jugement qui suit : " La cour, Considérant que le Demandeur a droit de réclamer du Défendeur une indemnité, pour le défaut par le Défendeur d'avoir construit la maison mentionnée en l'acte d'échange entre le Demandeur et le Défendeur reçu devant Chs. M. Lebrun et son confrère, notaires, le vingt-cinq octobre 1838, et que suivant les admissions des parties, la valeur de cette maison est de £9 ; considérant, de plus, que le Demandeur n'a aucunement établi cette partie de sa demande, par laquelle il réclame la somme de £28 11 3, qu'il prétend avoir payée à Jean-Bte Surault, et qu'il ne peut en conséquence, réclamer du Défendeur, quant à ces deux chefs ; considérant, en outre, que le Défendeur n'ayant pas payé avant l'institution de la présente action, la somme de £20 16 8, à Joseph Brazeau, indiqué au dit acte d'échange par le Demandeur, et n'en rapporte aucune quittance valable, le Demandeur a droit de répéter la dite somme ; considérant, encore que le Défendeur n'a pas justifié son exception de compensation, quant à la somme de £37, 15 10, et que nonobstant l'articulation de faits soumise par le Défendeur, et à laquelle le Demandeur n'a pas répondu, les créances opposées ainsi en compensation par le Défendeur, n'étant pas claires et liquides, ne peuvent en droit être admises comme une extinction de la dette du Demandeur, qui est une dette claire et liquide, et que le Défendeur n'a fait preuve d'aucun paiement autre que celui de la somme de 250 livres, ancien cours, montant du transport fait par le Demandeur au nommé Antoine A. Trottier, le vingt avril 1840, devant Chs M. Lebrun et son confrère, notaires, condamne le Défendeur à payer au Demandeur la somme de £71,13,5, balance tant en principal qu'intérêts dus au vingt-huit juillet 1858, par le Défendeur au Demandeur pour les causes mentionnées en sa déclaration, et admises par le présent jugement; avec intérêt sur la somme de £34,8,4, balance en principal, à compter du 28 juillet 1858, jusqu'au paiement." Sur appel de ce jugement, la Cour du Banc de la Reine a donné gain de cause à l'Appelant, par la sentence suivante : " La cour, 1° considérant qu'en cour de première instance, le Défendeur a opposé à l'action du Demandeur un exception de compensation et paiement ; 2° considérant que les faits qui servent de base à cette exception, sont reproduits dans l'articulation de faits du Défendeur, que le Demandeur n'a pas répondu à cette

articulation de faits, et n'en a lui-même produit aucune ; que, même sa motion pour être admis à le faire a été rejetée par la cour de première instance : qu'ainsi, aux termes du statut de 1857, ch. 44, sec. 74. les faits énoncés dans l'articulation du Demandeur doivent être considérés comme admis par le Demandeur ; que, tel étant le cas, la demande doit être regardée comme éteinte depuis longtemps, et le Demandeur aurait dû en être déboutée, et que, par conséquent, il y a eu mal jugé par le jugement dont est appel : infirme le jugement rendu le 28 octobre 1859, par la Cour Supérieure siégeant dans le district de Beauharnais ; et cette cour, procédant a rendre le jugement que la dite Cour Supérieure aurait dû rendre, déboute l'Intimé de sa dite action." AYLWIN et DUVAL, Juges, différant. (10 *D. T.B. C.*, p. 422, et 4 *J.*, p. 284.)

BRANCHAUD, pour l'Appelant.

DENIS, pour l'Intimé.

APPEL.—CAUTIONNEMENT.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 13 septembre 1860.

Before Sir L. H. LAFONTAINE, Brt., C.-J., AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

BEDARD, Appellant, *and* THE CORPORATION OF THE PARISH OF ST. CHARLES-BORROMÉE, Respondents.

Held : 1° That in appeals, the service of a copy of the petition, notice and bond in appeal, at the *domicile* of the attorney *ad litem*, issufficient. under the 20 Vict., cap. 44, sec. 65.

2° That affidavits seeting forth that the property described in the appeal bond is not of the value of £50, will be received in support of a motion to dismiss the appeal for want of sufficient security, and the appeal will be dismissed on such motion, unless the Appellant deposit the sum of £50, together with the sum of $5 to cover the costs of such motion. (1)

This was an appeal from the Circuit Court. The copy of the petition, with the notice, and copy of the bail-bond, had been served at the *domicile* of the attorney *ad litem* of Respondents. TESSIER, for Respondents, moved to dismiss the appeal, contending that, where there was no service of the petition, notice and bail-bond upon the adverse party, either personally or at his domicile, the service upon the attorney should be personal, and not merely at his domicile, under the 20 Vic., cap. 44, sec. 65. (2) The distinction, he argued, was

(1) 20 Vic., cap. 44, sec. 65.

(2) Which provides that, " a copy of which petition " (in appeal), with, " notice of the time or day on or after which it may be proceeded upon by " the Court of Queen's Bench, and a copy of the appeal bond certified by the

clearly drawn in this clause, that the service might be upon the adverse party, either personally or at his domicile, but no such latitude was allowed where the service was made upon the attorney *ad litem*, because the words used in the clause were, "on his attorney *ad litem*" thereby intending a personal service. GUGY, for Appellant, argued that great expense and difficulty would unnecessarily be entailed upon suitors, if a personal service upon attorneys *ad litem* were required, inasmuch as professional engagements frequently required their absence from home; and that, in cases where the adverse party might reside in the country, to insist upon a personal service upon the attorney, would in all probability amount to an absolute denial of justice, and deprive the party of his right of appeal. TESSIER, for Respondents, presented a second motion to dismiss the appeal, supported by affidavits setting forth that the property described in the bail-bond was not of the value of £50, as required by the 62 section of the above statute. He contended he had a right to attack the bail-bond in this manner, inasmuch as, by the statute in question, the party Appellant could give security without notice to the adverse party or his attorney. GUGY, *contrà*, argued, that this motion involved a charge of perjury against the surety, and should not be adjudicated upon without allowing him an opportunity of being heard. The Appellant would also, doubtless, be able to produce witnesses that the property was worth more than the £50; and that, consequently, the court should not decide upon *ex parte* affidavits, without allowing Appellant an interval of a few days to collect counter affidavits.

DUVAL, Justice: Upon the first motion the court is with Appellant, as we consider the service at the domicile of the attorney *ad litem* to be sufficient. With respect to the second motion, we are of opinion that it must be granted, and the appeal dismissed for want of proper and sufficient security—(Gugy here suggested that Appellant would deposit the £50 in court, if required.) His Honor, after conferring with the other Judges, then said: We are of opinion that if Appellant deposit the £50, together with the sum of $5 to cover the costs of the adverse party on this motion, the appeal may be allowed. The Appellant having deposited these amounts, the Court ordered that the Respondent take nothing by his motion. (10 *D. T. B. C.*, p. 429.)

GUGY, for Appellant.

TESSIER and ROSS, for Respondents.

"clerck in whose office it is filed, shall be served on the adverse party personally or at domicile, or on his attorney *ad litem*, in the Circuit Court, within twenty-five days from the rendering of the Judgment appealed from." V. art. 1128 C. P. C.

DEPENS.

COUR SUPÉRIEURE, Québec, 5 octobre 1860.

Présent : STUART, Juge.

VALLÉE *vs.* LATOUCHE.

Jugé : Que lorsque l'action est portée pour une somme au-dessus de £50, et le jugement est rendu pour la somme de £50 avec intérêt, le Demandeur n'a droit qu'aux frais d'une action de la première classe dans la Cour de Circuit, et une motion pour reviser lo taxe du protonotaire accordant les frais de seconde classe dans la Cour Supérieure, sera accordée. (1)

L'action fut intentée pour la somme de £54 17 10, et jugement rendu pour la somme de £50, avec intérêt depuis la signification du bref de sommation. Le protonotaire avait taxé le mémoire de frais accordant au Demandeur les frais d'une action de seconde classe dans la Cour Supérieure.

DUVAL, sur motion pour reviser la taxe du protonotaire : Le Demandeur, suivant la 12e Vic., cap. 38, sec. 82, n'a droit qu'aux frais de la première classe dans la Cour de Circuit, le jugement n'étant que pour le montant de £50.

JOLICŒUR, *contrà :* Le jugement est pour £50, et intérêts depuis la signification du bref de sommation, conséquemment pour une somme au dessus de £50, et la taxe du protonotaire accordant les frais comme dans une cause de la seconde classe dans la Cour Supérieure est, pour cette raison, correcte.

STUART, Justice : Costs should only have awarded as in a case for £50 in the Circuit Court, and not as in a case in the Superior Court. The motion must therefore be granted. (10 *D. T. B. C.*, p. 433.)

BELLEAU et JOLICŒUR, pour le Demandeur.

DUVAL et TASCHEREAU, pour le Défendeur.

EFFRACTION.

QUEEN'S BENCH, APPEAL SIDE, 3 septembre 1860.

Before Sir L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, DUVAL and MONDELET, Justices.

REGINA *vs.* MARTIN.

Sur une question réservée pour la décision de la cour siégeant en Appel, sur conviction du Défendeur pour entrée par force dans une maison habitée.

Jugé : Que le Défendeur et les personnes qui étaient avec lui étant entrées dans la maison par une porte ouverte, et l'une de ces personnes

(1) V. art. 479 C. P. C.

étant sortie pour pousser les fenêtres du dehors, le Défendeur lui-même les enlevant, la conviction ne devait pas, dans les circonstances de la cause, être renversée. (1)

This was a question of law which arose on the trial of Hugh Martin, in the Court of Queen's Bench, Crown side, at the term held at Montreal, in March and April, 1860, and reserved by the presiding judge (Mondelet), for the consideration of the court, on the appeal side, under the terms of the statute 20 Vict., cap. 44, sect. 22. The indictment was to the effect that Hugh Martin, with other parties unknown, with force and arms, broke into a house situate in the city of Montreal, in the possession of George Pentland "unlawfully, "to wit, by forcing off, and taking away divers of the win- "dows from the said house, so as to expose the said George "Pentland and his family to an extreme degree of cold "weather then prevailing, and to cause them to perish from "such cold and exposure, violently, forcibly and injuriously, "and with a strong hand, did enter, and Hugh Martin, toge- "ther with the said other evil disposed persons, to the said "jurors unknown, as aforesaid, then and there, with force and "arms, to wit, by forcing off and taking away divers of the "said windows, for the purpose of exposing the said George "Pentland and his family to the extreme inclemency of the "winter, so as to cause them to perish as aforesaid, unlawful- "ly, violently, forcibly, injuriously, and with a strong hand, "the said George Pentland from the possession of the said "house did expel, amove and put out." Then follow similar allegations that he was "kept out" in like manner. It appeared from the evidence transmitted, that about noon, on the 29th December, 1859, Defendant, Martin, the landlord of the house, entered at the open door with one Wright, Pentland's wife and three children being then in the house, and without saying any thing proceeded to take off and carry away the windows. In the evening, Pentland's wife sent to Martin, and asked him to put up the windows, when he said: "Pay the rent, and I will put them up." On the 30th., Martin did not return to the house, but, on the 31st., the rent having been paid, the windows were put in about half past seven o'clock in the evening. It appeared also from evidence that, on the three days referred to, the thermometer was about ten degrees below zero, at five o'clock in the afternoon, and that it must have been twenty-two degrees below zero on the night of the 29th. The question reserved was in the following terms: "The "Defendant, and those who assisted him, having entered the "house through the kitchen door which was open, and one of

(1) V. art. 407 C. Crim.

"them having been sent out to push the windows in, and "Martin taking them off the hinges from inside the room, has "there been, in law, a forcible entry committed?" Judgment "after hearing counsel. "It is considered and adjudged, by the "court now here, pursuant to the statute in that behalf, that "the verdict of the jury and the conviction made and ren- "dered against Defendant in this cause, ought not to be dis- "turbed, by reason of any thing in the said case submitted." The Hon. Mr. Justice Mondelet dissenting. (10 *D. T. B. C.*, p. 435.)

JOHNSON, Q. C., for Prosecution.

DEVLIN, for Defendant.

PREUVE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 4th June, 1860.

Before Sir L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, DUVAL and MONDELET, Justices.

ROWELL, Appellant, *and* NEWTON, Respondent.

Le 23 octobre 1855, R. reconnut que N. lui avait fait cession de ses droits sur un certain lot de terre, et convint d'acheter les droits de N. dans cet immeuble, et de le prendre en paiement de ce que lui devait N., au prix qu'il serait estimé par deux personnes. Le 19 juin 1856, les personnes nommées estimèrent les droits de N. dans le lot, et firent rapport que R. donnerait crédit à N. pour $300, sur les dettes que N. lui devait, ou qu'il lui paierait le montant en argent. Le 29 mars 1859, N. porta une action contre R. pour les $300, alléguant l'expertise et l'estimation et que R. avait refusé de déduire les $300 sur les dettes dues, et l'avait contraint de les payer en entier. Le Défendeur plaida paiement, et réclama $1573.53, montant de certains billets produits, et que, sur un règlement de compte entre les parties, du 8 septembre 1856, les $300 avaient été portées en déduction ; il plaida aussi compensation et une dénégation générale. Le Défendeur produisit avec sa réponse, le reçu de R. du 8 septembre 1856, pour $650, en plein de toutes obligations et de tous jugements, billets, exécutions et comptes, et allégua que ce montant excédait ce qui était dû sur les quatre billets, et que tous ces billets avaient été payés en argent.

Jugé : Que les parties présentes le 8 septembre 1856, étaient inadmissibles comme témoins pour prouver les conversations entre le Demandeur et le Défendeur, relativement au règlement de comptes et à la déduction des $300, ou que N. eut admis telle déduction et tel règlement à la date du reçu. (1)

The Plaintiff's action was instituted in the Superior Court for the district of Bedford, and was based upon the following agreement of submission and appraisal. " Whereas William Newton has, this day, transferred to me his rights in the north half of lot number twenty, in the seventh range of

(1) V. art. 1233 C. C.

lots, in the township of Bolton, and upon the procurement of the patent from Government, I hereby agree to take his interest in the lot, and allow him, upon debts, due me from him, whatever Hiram Foster and Nathaniel Pettes, both of Brome, shall appraise it worth, and in case of a disagreement between them, they shall choose a third man, and the decision of a majority of the three shall be conclusive. Nelsonville, Oct. 23rd., 1856. (Signed) A. J. ROWELL." The award dated 19th June, 1856, after reciting the submission, and that the appraisers examined the premises and evidence adduced by the parties, and deliberated, goes on to state that " we have " come to the conclusion and determination, and do, therefore, " award that Rowell shall *allow* to Newton, the sum of three " hundred dollars, on the notes and debt he now holds against " Newton, or *pay him the money*." These documents were set up in Plaintiff's action, which was taken out on the 29th March, 1859, and it was further alleged that Defendant, disregarding the award, did not allow Plaintiff the $300, upon the debts due to him by Plaintiff, nor pay the sum of money, but sued out a writ of attachment, in the Superior Court, Montreal, for all notes and debts due by Plaintiff, and compelled him to pay the same in cash, although Rowell had obtained a patent from the Crown for the half lot in question. Conclusion for $300. First plea : Payment, on or about the 8th September 1856. The second plea set up the submission and award, also Plaintiff's indebtedness to Rowell, in the sum of $1578. 53, as the amount of four several promissory notes filed in the cause, made by Newton in favor of Rowell, and costs incurred on certain actions brought by Rowell against Newton, in the Superior Court, Montreal. It then set up settlement made between the parties on the 8th September, 1856, and that the three hundred dollars were allowed and deducted from the amount so due, to the satisfaction of Newton. The third plea set up the four notes and the costs in compensation, also Newton's acknowledgment of the debt. The answer to the second plea was, " that true it is, that Defendant held divers " promissory notes signed by Plaintiff, on account of which, " and on account of transactions connected therewith, a balance " of $650 was justly due to Defendant, at the time of the " making of said award, and upon which balance Defendant " should, of right, in pursuance of the agreement, have credited " to Plaintiff, the sum of $300 ;" but that he refused to credit or allow the same, and " instituted suits for the full amount, and " compelled Plaintiff to pay him, Defendant, in cash, the balance " due on said notes, which payment Plaintiff made, in full, at " the township of Potton, on the 8th of September, 1856, as

" will appear by Defendant's receipt. This receipt is in the " following terms : " Received of William Newton, six hundred " and fifty dollars, in full of all obligations now due me from " Newton, also all judgments at the court in Montreal and " elsewhere: also, all executions, and all notes, and book " accounts now due me from Newton. Potton, September 8th, " 1856. (Signed,) A. J. ROWELL." The answer to the third plea set up: That Defendant had sued Plaintiff on the four notes, and for a greater sum than was justly due, and that Plaintiff, to save costs, paid $650, a greater sum than was justly due, in full of all notes, claims and demands. The signature of Rowell to the submission was admitted, and that the appraisal or award was made as appeared by the copy produced. These admissions constituted the only evidence for Plaintiff. Two witnesses were produced on behalf of Defendant, but the question put to them were overruled, (1) and judgment rendered in favor of Plaintiff for $300. MCCORD, J. S., Justice. On behalf of the Appellant it was urged: 1. that the award went beyond the submission, the appraisers having no power to award money to Newton, and the intention being simply to settle the amount to be deducted or allowed by Rowell, for Newton's " interest " in the half lot; 2. that the amount of the interest being appraised at $300, compensation operated *de plano ;* the larger debt of $1573 being anterior to the award; 3. that the plain inference from the receipt was that the sum of $650 was paid as the balance due to Rowell

(1) MANSON, witness, stated that Defendant was a trader and that Plaintiff was a farmer and kept an inn : *Question.* Were you present at any time subsequent to the award, when a settlement was come to of all matters in dispute between the parties including the award ? *Answer.* I was. *Question.* When and where was this settlement, and that occurred on that occasion ? *Answer.* It was all verbal ; there was nothing in writing, except some figuring and notes and receipts passed between them. *Question.* Relate the verbal conversation that occurred between the parties on that occasion in reference to the settlement and payment of the award on the eighth day of September, 1856 ? (Objected to as illegal and as tending to prove a discharge of an obligation exceeding 100 livres, to wit, the sum of seventy-five pounds, currency, by parol testimony. Objection maintained.) *Question.* Did not Plaintiff, at the time of settlement, on the eighth day of September, 1856, admit that the amount of said award had been deducted from Defendant's claim against him, and that there had been a final settlement of the matters in dispute? (Objected to as illegal, objection maintained.) PHELPS, witness. *Question.* Did Plaintiff, at any time before the eighth day of September, 1856, tell you that he was about to settle his difficulties with Defendant, and that they were to have a final settlement of all claims and demands between them ? (Objected to as illegal, as tending to prove a discharge of an obligation exceeding one hundred *livres,* to wit the sum of seventy-five pounds, by parol testimony. Objection maintained.) *Question.* Did Plaintiff, on or after the eighth day of September, 1856, tell you, on one or several occasions, that he had settled all his difficulties with Defendant, and that a final settlement of all accounts, claims and demands between them had been made, including the amount of the award? (Objected to as above, objection maintained.)

by Newton, after settlement of all demands between them; 4. that the evidence offered by Defendant did not contradict the award, but tended to explain the receipt, and was therefore legal and admissible.

AYLWIN, Justice, dissenting: Held that the *onus probandi* lay on Plaintiff; that compensation was effected *de plein droit*, when the value of Respondent's interest in the land was ascertained by the appraisers; and that the receipt must be taken as evidence of the balance coming to Rowell, after deduction of this claim against him, by Newton, on the award.

Appeal dismissed. (10 *D. T. B. C.*, p. 437.)

O'HALLORAN, for Plaintiff.

DOHERTY, in Appeal.

BUCHANAN, for Defendant.

A. and W. ROBERTSON, in Appeal.

PROCEDURE.—PLAIDOYERS.—PREUVE.

SUPERIOR COURT, Montreal, 31th March, 1860.

Before SMITH, Justice.

DOW *vs.* BROWNE.

Dans une action contre un endosseur, le Defendeur plaida par exception, que les signatures par endossement sur les billets n'étaient pas sa signature, et n'y avaient pas été apposées à sa connaissance, de consentement, et avec son autorité, et que les dits billets n'étaient venus à sa connaissance que lorsqu'il avait reçu avis des protêts; il plaida aussi une défense en fait. Enfin de ces plaidoyers il y avait un affidavit du Défendeur, que tous les faits articulés en iceux étaient bien fondés.

Après l'enquête faite, il fut dit, lors de l'audition de la cause, qu'en vertu de la 87[e] sec. de la 20[e] Vic., cap. 44, jugement devait être rendu en faveur du Demandeur, l'affidavit n'étant pas dans la forme prescrite; sur ce, il fut fait motion par le Défendeur pour retirer la cause du délibéré, et pour rayer la cause du rôle, afin qu'il lui fût permis d'enfiler l'affidavit produit avec sa motion au soutien de ses plaidoyers.

Jugé: Que la motion était inadmissible; et que le Demandeur avait droit de demander que la signature fut présumée vraie, et que son droit d'obtenir jugement était un droit acquis, à l'encontre duquel la cour ne pouvait intervenir. (1)

The action was brought upon three promissory notes made by Thomas R. Browne, and alleged to be indorsed by Defendant. The Defendant pleaded, by exception, " that the signature " by Browne set and signed to, and written and endorsed upon " the promissory notes, is not his signature, was not written " by him, and was not written thereon with his knowledge, " consent and authority, and that he was not aware of the " existence of the said promissory notes, until notified that

(1) V. art. 145 C. P. C. et 1223 et 1224 C. C.

" the notes had been protested." At the bottom of the pleas, Defendant made an affidavit " that all the facts articulated " and set forth in the foregoing pleas, are, and each of them is " true and well founded." Witnesses were examined by Plaintiff and by Defendant, as to the genuineness of the signature indorsed on the notes. At the hearing on the merits, it was urged, on behalf of Plaintiff, that he was entitled to judgment irrespective of the proof of record, as well as upon the facts established in evidence, inasmuch as the affidavit of Defendant was not made in conformity with the 87th section of the 20th Vict., cap. 44, which is in the following terms: " If in " any action on a bill of exchange or promissory note, *cédule*, " check, note or promise, or other act or private agreement in " writing, the Defendant shall make default, or for any other " reason the Plaintiff shall become entitled to proceed *ex parte*, " then such bill or note, check, promise, act or agreement, and " every signature and writing to or upon the same, shall be " presumed to be genuine without proof thereof, and judgment " may be rendered accordingly; and if in any such action any " Defendant shall deny his signature, or any other signature " or writing to or upon such bill, note, *cédule*, check, promise, " act or agrgement, or the genuineness of such instrument or " of any part thereof, or that the protest, notice and service " thereof (i any be alleged by the Plaintiff) were regularly " made, whether such denial be made by pleading the general " issue or other plea, such instrument and signatures shall " nevertheless be presumed to be genuine, and such protest, " notice and service to have been regularly made, unless with " such plea there be filed an affidavit of such Defendant, or " of some person acting as his agent or clerk and cognizant " of the facts in such capacity, that such instrument or some " material part thereof is not genuine, or that his signature " or some other to or upon such instrument is forged, or that " such protest, notice and service were not regularly made, " and in what the alleged irregularity consist; but nothing in " this section shall take away any *recours en faux*, or any " remedy by *enquête civile* after judgment if any such signa" ture be forged." On the 27th February, Defendant moved to discharge the *délibéré*, and that the cause be struck from the *rôle de droit*, and that he be permitted to file, in support of his pleas, the affidavit tendered with the motion. This affidavit alleged the forgery of the indorsations on the notes.

SMITH, Justice, held that the requirements of the statute had not been complied with, that the affidavit should have set forth that the signatures were forged, and that, this not having been done, Plaintiff was entitled to judgment without proof. That this was a *droit acquis*; the presumption of the

genuineness of the signature was a presumption of law, under the statute, and that the court could not enter into the consideration of the evidence, which must be looked upon as of no effect, the genuineness of the signatures not having been legally put in issue.

Judgment: "Considering that Plaintiff hath proved and "established the material allegations of his action, and that, "by reason of there being no legal or sufficient affidavit pro-"duced by Defendant with his plea, denying the validity of "his signature, as indorsed on the notes on which the present "action is based, the fact of the signature of Defendant, as "indorser, is thereby proved and established. And further, "considering that, by the effect of the 20th Vict., chap. 44, "sec. 87, all signatures shall be taken and held genuine and "to be proved, unless, with the plea denying such signatures, "an affidavit is filed and produced according to the provisions "of the act; and, further, considering that, by reason of the "absence of such affidavit, and by force of the said statute "above referred to, the fact of the genuineness or truth of the "said signatures cannot be traversed or put in issue: and, "further, considering that the evidence adduced by Defendant "cannot in law affect the issue so settled by the statute in "question; the court doth overlook and hold as naught the "said evidence. And, further, adjudicating on the motion of "Defendant to put in an affidavit in conformity to the provi-"sion of said act, the court doth adjudge said motion to be "inadmissible, and doth reject said motion. And the court "adjudging on the claim of Plaintiff, doth condemn Defendant "to pay and satisfy to Plaintiff the sum of $1,486. 71c." (10 *D. T. B. C.*, p. 442.)

STUART, HENRY, for Plaintiff.

LEBLANC and CASSIDY, for Defendant.

SIGNATURE.—DENEGATION.—PREUVE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 1st June, 1861.

Before Sir LOUIS H. LAFONTAINE, Baronet., Chief-Justice, AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

BROWN, APPELLANT, *and* DOW, Respondent.

Dans une action contre un endosseur, le Défendeur plaida par exception que les signatures endossées sur les billets n'étaient pas sa signature, et n'y avaient pas été apposées à sa connaissance, de son consentement ou avec son autorité, et qu'il ne connaissait pas l'existence des dits billets, avant la signification du protêt : il plaida aussi une défense au fond en fait, et au bas de ces plaidoyers était un affidavit du Défendeur, que tous les faits articulés en iceux étaient bien fondés.

La preuve faite, il fut prétendu, lors de l'audition de la cause, que le Demandeur devait obtenir jugement en vertu des dispositions de la 87e section de la 20 Vic., cap. 44, l'affidavit n'étant pas dans la forme voulue. Sur ce, motion fut faite par le Défendeur pour rayer la cause du rôle, et la retirer du délibéré, et qu'il lui fût permis d'enfiler l'affidavit produit avec la motion au soutien de ses plaidoyers.

***Jugé*, dans la Cour Supérieure, Montréal : Que la motion était inadmissible, et que le droit du Demandeur de prendre les signatures comme vraies, et d'obtenir jugement était un droit acquis, à l'égard duquel la cour ne devait pas intervenir, la vérité des signatures n'ayant pas été légalement révoquée en doute.**

En Appel : 1° Que l'affidavit était suffisant.

2° Que la signature endossée sur les billets n'était pas la signature de l'Appelant, mais était contrefaite. (1)

AYLWIN, Justice, *dissenting :* The action was brought against the endorser of three promissory notes, the plea was that Appellant's signature on the notes " was not written by " him, and was not written thereon with his knowledge, " consent and authority, and that he was not aware of the " existence of the promissory notes until notified of the " protests." To the pleas there was appended a general affidavit that the facts set forth in these pleas were true. The question was whether this was sufficient, under the 87th sect. of the 20th Vict., cap. 44, which enacted that the signature of a note &c., " should be presumed to be genuine " unless an affidavit were made that " such instrument or some material " part thereof is not genuine, or that his signature, or some " other, to or upon such instrument, is forged." He held, with the court below, that the plea and affidavit were not sufficient under the statute. The statute admitted of no circumlocution or periphrase. It was not sufficient to set up facts from which forgery might, or might not, be inferred ; the statute did not permit of inference, the word forgery must be used, *à peine de nullité.* In other statutes, in the cases of *capias* and attachment before judgment, it had been repeatedly held, that the very language of the statute must be used, and the same particularity should be required here, where the object was to prevent delays. Had there been an affidavit of forgery, this would have thrown the *onus* upon Defendant ; he must, in that case, have begun his *enquête* and made out his case. This had been done, and Plaintiff had no opportunity of producing evidence in rebuttal. An application had been made in the court below to substitute another and a correct affidavit, and, at first, he was disposed to think that the application should have been granted, but, upon reflection, he did not think the express terms of the law could be got rid of in that way. The argument drawn from the general form of affidavit used in cases of opposition ought not to prevail. The general form of

(1) For report of this case in the court below, see *supra* p. 451.

the affidavit in such cases is a cloak for perjury, and no extension should be given to it, on the contrary, it should be restricted within the narrowest possible limits.

Sir L. H. LaFontaine, Bart., C.-J. : La demande avait pour objet le paiement de trois billets prétendus avoir été souscrits par Thomas R. Browne, à l'ordre du Defendeur-Appelant, et passés à l'ordre, d'abord, de William Dow & Cie, puis du Demandeur-Intimé, formant en capital, intérêts calculés jusqu'au 19 octobre 1859, et frais de protêt, la somme de $1486.71. Le Défendeur-Appelant a présenté une exception péremptoire, qui contient trois chefs entièrement semblables, y ayant un chef applicable à chacun des billets. Il suffit donc d'en citer un seul. "The Plaintiff cannot have and maintain his action, " nor the conclusions by him taken in and by his declaration, " because, he Defendant saith, that the signature "George " Browne " set and signed to, and written and endorsed upon " the promissory note in the Plaintiff's declaration firstly re- " ferred to filed, as Plaintiff's Exhibit n° 1, is not his signature, was not written by him, and was not written thereon with his knowlege, consent, or authority, and that he was not " aware of the existence of said promissory note until notified " that the note had been protested and Defendant further " saith that he never promised to pay the sum of money in " said note specified, or the interest thereon, or the costs or " expenses of protest and notice thereof, or any part thereof, " but, on the contrary, that he hath always and wholly refused " so to do, for the reason aforesaid." L'exception péremptoire est suivie d'une défense au fond en fait. Puis, au bas de ces deux plaidoyers, est l'affidavit suivant, fait et signé par le Défendeur : " And the Defendant, being duly sworn, doth depose " and say, that all the facts articulated and set forth in the " foregoing pleas, are, and each of them is, true and well foun- " ded, and hath signed. " Dans sa réponse à l'exception péremptoire, le Demandeur s'est contenté d'une dénégation générale des faits qui y sont articulés, et que le Défendeur affirme de nouveau dans sa réplique à cette réponse. Le 24 novembre 1859, deux consentements, signés des procureurs des parties, sont produits dans la cause, l'un à l'effet que les parties soient dispensées mutuellement de faire l'articulation de faits requise par la 74e section de l'acte de judicature de 1857, et l'autre à l'effet que l'enquête soit faite en la manière suivie avant et acte de judicature. Puis, le 25 janvier 1860, le Demandeur inscrit au rôle de droit pour enquête et audition au mérite le 8 février suivant. D'après l'appréciation que j'ai faite des témoignages produits de part et d'autre, j'en suis venu à la conclusion que la signature, "George Browne," écrite au dos des billets en question, n'est

pas la vraie signature du Défendeur, qu'elle est contrefaite. Trois témoins ont été entendus de la part du Demandeur, et quatorze de la part du Défendeur. Le 8 février 1860, les parties ayant declaré leur enquête close, et ayant été entendues au mérite, la cause fut prise en délibéré. Le 27, le Défendeur fait motion (appuyée sur des affidavits) pour obtenir que la cause soit retirée du délibéré, afin qu'il lui soit permis d'ajouter à son premier affidavit écrit au bas de ses plaidoyers, en jurant en propres termes que sa signature avait été contrefaite (forged). Le 19 mars, les parties sont entendues sur cette motion, et le 31 du même mois, intervient le jugement dont est appel, qui rejette la motion du Défendeur, et le condamne à payer le montant de la demande, principalement sur le motif que le plaidoyer du Défendeur, dans lequel il déniait sa signature aux billets, n'était pas accompagné d'un affidavit fait conformément aux disposition de l'acte 20 Vict., ch. 44, sec. 87. Cette section est la 86[e] du chapitre 83 des statuts refondus du Bas-Canada, et elle est là, subdivisée en trois parties. La première partie contient une disposition à peu près semblable à celle de la 10[e] section du statut de 1801, ch. 7. Il y a seulement cette difference, qu'elle exige moins de formalités. Sous l'autorité du statut de 1801, un Demandeur, en paiement d'un billet, avait tout le bénéfice de la présomption établie par ce statut, lorsque, par sa déclaration, il avait conclu à ce que le débiteur comparût pour reconnaître ou nier sa signature, et lorsque le billet avait été dûment signifié au Défendeur, en lui en exhibant l'original, et lui en laissant copie avec la déclaration. Si, dans ce cas, le Défendeur faisait défaut, le billet était tenu pour reconnu, et le cour procédait à donner jugement. Mais il fallait que "le service et exhibition du billet fussent faits à la personne du Défendeur, et que l'huissier qui avait fait tel service, fût tenu de l'affirmer devant un des juges de la cour." Ce n'était donc qu'une simple présomption de droit au profit du Demandeur, puisqu'il suffisait d'une simple comparution du Défendeur pour la faire disparaître. La première partie de la 86[e] section du chap. 83, ci-dessus cité, établit la même présomption : "Si.... le Défendeur fait défaut, ou si pour toute autre raison le Demandeur se trouve avoir droit de procéder *ex parte*, alors," porte la section, "tel billet.... et toute signature et écriture sur icelui, *seront présumés vrais* sans en faire la preuve, et jugement pourra être rendu en conséquence." La deuxième partie de la même section dispose pour le cas où la signature est *niée* par le Défendeur. "Que cette dénégation soit faite en plaidant la dénégation générale" (permettant ainsi de nouveau de plaider cette dénégation générale), "ou dans d'autres plaidoyers, telle signature sera néanmoins *présumée vraie*...., à moins qu'a-

vec tel plaidoyer il ne soit produit un affidavit du dit Défendeur ou de quelque personne agissant comme son agent, ou commis, et connaissant les faits en telle qualité, à l'effet que ....sa signature.... est contrefaite " (*forged* dans la version anglaise). Enfin dans la troisième partie, il est dit, " mais rien de contenu dans cette section ne préjudiciera à tout recours en faux, ou tout recours par requête civile après jugement, si telle signature est contrefaite." Dans son exception péremptoire, le Défendeur a dit : La signature en question " is not " my signature, was not written by me, and was not written " thereon with my knowledge, consent or authority." *La défense au fond en fait,* qui contient une dénégation générale, est aussi censée dire la même chose. Si cela ne signifie pas que la signature du Défendeur a été *contrèfaite ;* si des termes aussi clairs sont insuffisants à produire dans l'esprit d'un juge la conviction que l'intention du Défendeur a été de dire que sa signature avait été ainsi contrefaite, alors, il faut renoncer à jamais pouvoir " appliquer les règles d'interprétation applicables aux mêmes termes dans les transactions ordinaires de la vie ; " il ne faut plus regarder comme devant suffire à la plaidoirie écrite un " exposé de bonne foi " des moyens que les parties veulent employer ; enfin, il faut dire que le Défendeur a eu tort de se reposer sur la 87e section du statut de 1849, ch. 38, car elle n'aurait pas existé pour lui : si, au contraire, le mot " contrefait " doit être censé compris dans les termes dont s'est servi le Défendeur dans ses plaidoyers ; s'il est vrai que l'intention du Défendeur a été qu'il en fût ainsi ; si ce sont des termes équivalents dont il s'est servi, il a, dans l'affidavit qui accompagne ses plaidoyers, et, par conséquent, l'exception péremptoire, remplit le but de la nouvelle loi, non seulement dans son esprit, mais même dans sa lettre. L'affidavit fait partie des plaidoyers, même ce me semble, aux yeux de ceux qui seraient disposés à regarder l'affidavit comme absolument nécessaire dans tous les cas. " La partie adverse ne peut pas avoir été induite en erreur par le dit plaidoyer sur la nature réelle et l'effet des faits qu'on a eu l'intention d'y alléguer ou de prouver d'après ce plaidoyer" (statut de 1849, ch. 38, sect. 86). Le législateur dans la 2e partie de la 86e section du statut, n'a eu l'intention d'établir qu'une présomption *juris* et non une présomption *juris et de jure.* La première existera en faveur du Demandeur, si le Défendeur qui nie sa signature, n'affirme pas cette dénégation par un affidavit. La signature, en ce cas, sera *présumée vraie* (ce sont les termes du statut) jusqu'à preuve du contraire. Cette preuve du contraire, il doit être permis au Défendeur de la faire. " Les présomptions *juris* font la même foi qu'une preuve, et elles dispensent la partie en faveur de qui elles militent d'en faire aucune, pour fonder

sa demande ou ses défenses; mais, et c'est en cela qu'elles diffèrent des présomptions *juris et de jure*, elles n'excluent pas la partie contre qui elles militent d'être reçue à faire la preuve du contraire, et si cette partie vient à bout de la faire, elle détruira la présomption."

Mais si la dénégation de la signature est accompagnée de *l'affidavit* du Défendeur, la présomption *juris* n'existe pas : le Demandeur n'est pas dispensé de faire d'abord et en premier lieu la preuve de la signature. Dans ce cas, c'est à lui à commencer l'enquête, dans l'autre, c'est au Défendeur. C'est la seule différence qui existe. Le présent Demandeur l'a si bien compris lui-même, qu'à l'enquête, il a, le premier, fait entendre ses témoins.

Ce qui sert encore à démontrer, plus clairement s'il est possible, que le statut n'a pas établi une présomption *juris et de jure*, c'est qu'il réserve au Défendeur son recours en faux. Il lui réserve ce recours sans exiger au préalable un affidavit. Ainsi, le Défendeur, se contentant de son exception péremptoire ou de sa défense au fonds en fait, nécessaire en ce cas pour ne pas donner lieu à la présomption de droit établie par la première partie de la 86e section, mais sans faire aucun affidavit, aurait donc pu s'inscrire en faux, et par là parvenir au même but, c'est-à dire, prouver que sa signature avait été contrefaite.

On peut concevoir un cas où il serait impossible à une partie défenderesse qui *nierait* une signature, d'accompagner sa dénégation d'un *affidavit* que cette signature a été contrefaite, d'abord parce qu'elle ne connaîtrait pas elle-même la signature de la personne que l'on prétendrait l'avoir apposée au billet, et ensuite parce qu'elle n'aurait, selon les termes du statut, ni " agent ou commis et connaissant les faits en telle qualité, qui pût faire cet *affidavit*. Le jugement attaqué consacrant en principe qu'en l'absence d'un *affidavit*, il y a au profit du Demandeur présomption *juris et de jure*, il s'ensuivrait que, dans l'hypothèse ci-dessus indiquée, la partie défenderesse serait condamnée, bien qu'elle pût prouver par témoins la fausseté de la signature. Et elle serait ainsi condamnée, parce qu'il lui aurait été humainement impossible de produire *l'affidavit* dont parle le statut.

MONDELET, Justice, stated in effect that the questions to be decided were : Was the court below right in holding that for want of the word forged or false, forged and fabricated, in the affidavit, a right had accrued to the Plaintiff to obtain judgment ? Was the Defendant debarred from proof under the circumstances ? Are the signatures shewn to be false ? He held that the court below had misapplied the statute. The Defendant had made affidavit that the signatures were not

written on the notes with his knowledge, consent and authority; that he was not aware of the existence of the notes until notified of the protest. It would have been better to have used the words of the statute, but the affidavit says in fact the signatures were forged; he says "I never signed the notes; I never authorized any one to sign them." The affidavit may not be perfectly regular, and yet not be *a nullity*. If the court below held the presumption *juris et de jure*, he could not go so far. This would exclude all evidence to the contrary which was not the intention of the statute. It was said the Plaintiff had no opportunity of rebuttal, but it was not a case for rebuttal. It was an ordinary case of a signature denied. The Plaintiff alleged the signature to be the Defendant's, and went on to prove it, he might have destroyed the Defendant's evidence, but could not, on rebuttal, support his own case. As to the application to file another affidavit, he held it to be unnecessary, the affidavit as filed being sufficience. On the one question of the genuineness or falsity of the signatures, he would only say that it was a question of evidence. He had no doubt the signatures were forged.

JUDGMENT : 1° Considérant qu'il résulte de la preuve que la signature "George Browne," qui se trouve au dos des billets sur lesquels l'action est fondée, n'est pas la vraie signature du Défendeur-Appelant, que cette signature est contrefaite; 2° considérant que l'affidavit fait et signé par le Défendeur au bas de son exception péremptoire et de sa défense au fond en fait, est suffisant, et répond à ce que la loi exigeait de lui en pareil cas ; qu'en décidant le contraire, et en donnant gain de cause au Demandeur-Intimé, il y a eu mal jugé de la part de la cour de première instance. La cour renverse, etc. (11 *D. T. B. C.*, p. 273.)

LEBLANC and CASSIDY, for Appellant.

STVART, for Respondent.

COMPETENCE.

SUPERIOR COURT, Montreal, 2nd October, 1860.

Ex parte SWEET, Petitioner.

Jugé: 1° Qu'un juge de la Cour Supérieure pour le Bas-Canada, à Montréal, n'a aucune juridiction pour recevoir l'affidavit des témoins à un testament, ou d'en accorder le *probate*, le testateur étant décédé dans le district de Beauharnois.

2° Que, pour cet objet, l'on doit s'adresser à un juge ou au protonotaire de la cour dans les limites du district de Beauharnois. (1)

(1) V. art. 857 C. C.

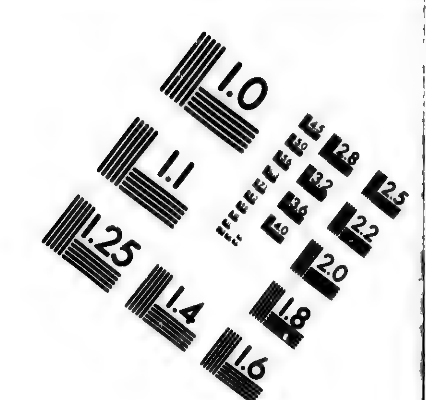
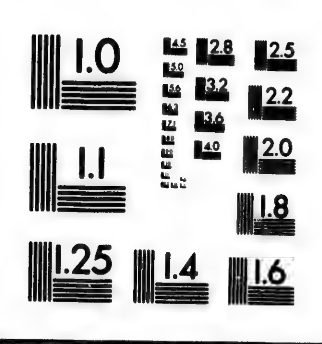


IMAGE EVALUATION TEST TARGET (MT-3)



6"



A petition was presented to Mr. Justice SMITH, in chambers, by the executor and universal legatee of Aaron Sweet, late of the township of Hemmingford, district of Beauharnois, for the probate of his will; and the witnesses to the will being present, application was made that they be sworn before a Judge to the usual affidavits, even if the order or probate was not made. Application refused, on the ground that a Judge had no jurisdiction, either to receive the oath or to grant probate of the will, in the district of Montreal, inasmuch as the testator had died in the district of Beauharnois; and that the application must be made to a Judge or to the prothonotary within that district. (10 *D. T. B. C.*, p. 451.)

ROBERTSON, A. and W., for Petitioner.

CAUTIONNEMENT POUR FRAIS.

SUPERIOR COURT, Québec, 5 octobre 1860.

Before STUART, Justice.

BRIGHAM, Plaintiff, *vs.* McDONNELL et al., Defendants, and DEVLIN, Opposant.

Jugé: Que lorsqu'un Demandeur, résidant hors la Province, conteste une opposition, l'Opposant n'est pas en droit, sous les dispositions de la 41e Geo. III, ch. 7, sec. 2, de demander cautionnement pour les frais; le Demandeur, en pareil cas, n'étant pas la partie poursuivante, mais, au contraire, occupant la position d'un Défendeur.

The Plaintiff, residing without the Province, having obtained judgment against Defendants, sued out execution, whereupon Opposant, the wife of one of Defendants, filed an opposition *à fin d'annuler*, and moved upon Plaintiff to put in security for costs.

IRVINE, for Plaintiff: the Opposant is not entitled to security for costs, because, so for as the opposition is concerned, Plaintiff is merely in the position of a Defendant; and it is only the Plaintiff or party prosecuting who is required by law to give security. (1)

JONES, for Opposant: All parties to a suit, residing without the Province, are obliged to give security, not merely Plaintiffs or parties prosecuting in any proceeding. (2)

STUART, Justice: There is no law to justify such a motion as this. The act cited merely provides that Plaintiffs, or parties prosecuting, shall give security if required; now, here, in so far as regards the proceedings on the opposition, Plaintiff

(1) 41 Geo. III, cap. 7, sec. 2; Revised Statutes, p. 112.

(2) 8 *R. J. R. Q.*, p. 154; 7 *R. J. R. Q.*, p. 112.

is merely in the position of a Defendant, and is not, therefore, bound to give security. Motion dismissed. (10 *D. T. B. C.*, p. 452.)

HOLT and IRVINE, for Plaintiff.

JONES and HEARN, for Opposant.

SEPARATION DE BIENS.—PREUVE.

QUEEN'S BENCH, APPEAL SIDE, Montréal, 31 mai 1860.

Before: Sir L. H. LAFONTAINE, Chief-Justice, Bart., AYLWIN, DUVAL and BADGLEY, Justices.

MALONEY, Appellant, *and* QUINN, Respondent.

Jugé, en appel: Dans une action par une femme contre son mari, en séparation de biens, qu'il y avait erreur dans le jugement de la Cour inférieure en prenant pour avérés certains interrogatoires sur faits et articles signifiés au mari, l'aveu ou consentement étant inadmissible. (1)

The action was *en séparation de biens*, brought by Rosanna Quinn, against her husband, the Appellant, for alleged waste, misconduct and intemperance. Pleas. *First.* That the waste of the community property was occasioned by Plaintiff. *Second.* That Plaintiff had been guilty of adultery. Replication to first plea, general, to the second, that Defendant had been guilty of adultery. Evidence was adduced on both sides, and interrogatories *sur faits et articles* were submitted to the husband, who failed to appear, and a motion was made by Plaintiff that the interrogatories be taken *pro confessis*. Judgment, in the Superior Court, Montreal, 6th May, 1859, C. MONDELET, Justice: "Considering that Defendant hath neglected to appear and answer to the interrogatories *sur faits* "*et articles* duly served upon him, doth declare the said *faits* "*et articles* to be admitted and confessed" and that Plaintiff be and remain separated as to property, etc. On appeal by the husband, the Court of Queen's Bench held that the *aveu* or consent of the husband, in such a case, was inadmissible, and reformed the judgment. "La cour, considérant que, dans le "jugement dont est appel, il y a bien jugé, en autant qu'il prononce séparation de biens entre les parties, mais qu'il y a lieu "de le réformer, en ce qu'il admet la motion de la Demanderesse, à l'effet de tenir pour confessés et avérés les interrogatoires sur faits et articles soumis au Défendeur-Appelant, ce "moyen de preuve tendant à obtenir l'aveu ou consentement "qui est inadmissible en pareil cas," réforme le jugement, &c.,

(1) V. art. 221 et 976 C. P. C.

" rejette les interrogatoires comme étant inadmissibles dans " cette instance ; mais confirme sur tous les autres rapports le " jugement." (10 *D. T. B. C.*, p. 454.)

MacKay and Austin, for Appellant.

Doherty, for Respondent.

ASSIGNATION.—QUALITE DES PARTIES.—EXCEPTION A LA FORME.

Queen's Bench, Appeal Side, Montreal, 9 June, 1860.

Before Sir Louis H. LaFontaine, Chief-Justice, Bart., Aylwin, Duval and Mondelet, Justices.

Boucher, Appellant, *and* Lemoine *et al.*, Respondents.

Un Défendeur, qualifié dans le writ et dans la déclaration, de "menuisier," plaida, par exception à la forme, qu'il n'était pas et n'avait jamais été un "menuisier," mais qu'il était un "contracteur et commerçant," et, après enquête, l'exception fut maintenue en Cour inférieure, et l'action, quant à lui, renvoyée.

Jugé, en appel : Que la qualité de "menuisier," donnée dans le writ, était établie par la preuve ; que le Défendeur s'était lui-même désigné par telle qualité dans des actes authentiques, et que, si, de fait, il était entrepreneur, ainsi qu'il l'alléguait, cette qualité était réconciliable avec celle de menuisier. (1)

Lemoine, one of Defendants, pleaded, by exception *à la forme*, that he was not a *menuisier*, as styled in the writ and declaration, but was a contractor and trader. The answer of Plaintiff was to the effect that he was properly designated. Two notarial instruments, signed by Lemoine, in 1846 and 1847, were filed by Plaintiff, in which he was styled *maître-menuisier et entrepreneur*, and other evidence was adduced on both sides. Judgment was rendered in the Superior Court, Montreal, 29th February, 1860, Smith, Justice, maintaining the exception, and dismissing the action as to Lemoine. Judgment in appeal. " Considérant qu'il est prouvé que P. G. Lemoine, l'un des Défendeurs, est menuisier de son métier, qu'il " s'est lui-même qualifié ainsi dans des actes authentiques, qu'il " n'a pas établi qu'il fût commerçant, qualité qu'il veut prendre " à présent, qu'en le supposant entrepreneur, autre qualité qu'il " veut aussi prendre, cette qualité se concilierait avec celle de " menuisier qui lui est donnée dans la déclaration du Demandeur ; que, par conséquent, l'exception à la forme présentée " par Lemoine est mal fondée, et que, partant, il y a mal jugé " dans le jugement qui la maintient. Infirme le dit jugement,

(1) V. art. 49, 51 et 116 C. P. C.

"et déboute l'exception à la forme," etc. (10 *D. T. B. C.*, p. 456.)

DOUTRE, L., for Appellant.

STUART, H., for Respondent.

PROCEDURE.—FOLLE ENCHERE.

COUR SUPÉRIEURE, Québec, 4 septembre 1860.

Présent : TASCHEREAU, Juge-Assistant.

CLOUTIER, Demandeur, *vs.* CLOUTIER, Défendeur, et RHÉAUME, Opposant, et DION, Adjudicataire.

Jugé : 1. Qu'une motion pour folle enchère contre un adjudicataire, femme séparée de biens d'avec son mari, sera rejetée, à moins qu'avis de telle motion ne soit donné à son mari en même temps que tel avis lui est signifié. (1)

2. Qu'il ne sera pas permis à un Opposant de faire motion pour folle enchère, avant qu'il se soit écoulé un délai raisonnable de quelques jours pour permettre au Demandeur de faire telle motion, après lequel délai il sera loisible à aucune partie dans la cause de faire la motion. (2)

L'Opposant fit motion pour *folle enchère*, contre l'Adjudicataire, épouse de Louis Cloutier, *séparée de biens en justice et dûment autorisée*, attendu qu'elle avait négligé de payer le prix de son adjudication.

TASCHEREAU, Juge : La motion est renvoyée, premièrement, parce que cette motion n'a pas été signifiée au mari de l'Adjudicataire, et, quoique cette objection n'ait pas été prise par les parties dans la cause, la cour est d'opinion qu'il est nécessaire qu'avis soit donné au mari de l'Adjudicataire. La cour est aussi d'avis que cette motion doit être renvoyée, par la raison que la motion est prématurée de la part de l'Opposant, et qu'un délai raisonnable de quelques jours devrait être accordé au Demandeur pour faire cette motion, après lequel délai il eut été permis à l'Opposant ou au Défendeur, ou autre personne ayant un intérêt dans la cause, de la faire. Motion rejetée. (10 *D. T. B. C.*, p. 457.)

BOSSÉ et BOSSÉ, pour le Demandeur.

CASAULT et LANGLOIS, pour l'Opposant.

TALBOT, pour l'Adjudicataire.

(1) V. art. 690 C. P. C.

(2) V. art. 691 C. P. C.

ENQUETE.—IRREGULARITES.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 17th December, 1859.

Before Sir L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

SUPPLE, Appellant, *and* KENNEDY, Respondent.

Jugé : 1. Qu'un témoin sur le point de laisser la Province peut, en vertu de la 25e George III, cap. 2, sect. 12, être examiné avant le rapport de l'action. (1)

2. Que des irrégularités graves par elles-mêmes seront censées abandonnées, s'il n'en est porté plainte dans l'an.

Savoir, si cette cour doit reviser les ordres d'un juge faits en vacance, qui n'ont jamais été le sujet de réclamation dans la Cour inférieure.

AYLWIN, Justice : The Defendant is sued by the name of John Supple, of Pembroke, in Upper Canada, now at the city of Quebec, lumber merchant. The suit commenced by *capias*, the return day of the process was the 21st September, 1857, the arrest was made on the 8th, and the copy of the declaration was left at the sheriff's office, for Defendant, on the 11th September. The declaration contains nothing but the common counts in assumpsit, with the addition of one "for "meat, drink, washing and lodging and other necessaries." A bill of particulars was filed on the return day, 21st September, as follows, J. Supple to J. Kennedy Dr. To work and labour and services rendered you, from 30th September, 1856, to 7th September, 1857, 11 months and 23 days, at £5 per month, £58 16 8." On the 10th September, a petition was presented by the Plaintiff to one of the learned judges of the Superior Court setting forth that Thomas O'Mara "now at the "city of Quebec is a necessary and material witness for your "petitioner, to prove his demand that O'Mara is immediately "about to leave the Province of Canada, whereby, without "an order for his examination as a witness, before his depar- "ture, your petitioner will be deprived of his evidence, as "such material witness, without which your petitioner cannot "safely proceed to trial." The prayer of the petition is for an order "that Defendant do appear before you in chambers, "in the court house, in this city, on Friday the eleventh of "September instant, at the hour of ten in the forenoon, and "that O'Mara be then and there sworn and examined as a "witness, in the usual and accustomed manner, unless good "cause be then and there shewn by Defendant, or on his "behalf." At the foot of this petition are written, the two following orders : "Let the prayer of the foregoing petition

(1) V. art. 240 C. P. C.

" be granted, and let the same be served upon Defendant, and " let Defendant appear, at the hour and place mentioned in " the petition, to shew cause, if any he have against the " granting of the prayer of the petition. Quebec, 10th Septem- " ber, 1857. J. Chabot, J. S. C." " The Plaintiff appears by his " attorney, Defendant not appearing, and it is ordered that " Thomas O'Mara be examined as a witness, as prayed for, " this day, at noon, in the court room of the Court House, in " this city. Quebec, 11th September, 1857. W. Badgley, " J. S. C." There is, after this, written upon the same paper, a bailiff's certificate dated Quebec 11th September, 1857, signed " Jos. Plamondon, H. S. C." " Avoir, le onze du courant, " entre neuf et dix heures du matin, signifié le présent writ et " la déclaration y annexée à John Supple, Défendeur en cette " cause, en lui délivrant des copies certifiées d'iceux, à Québec, " parlant à lui-même en personne, et en lui exhibant, alors et " là, les présents originaux d'iceux writ et déclaration." On the back of the paper is written another certificate, in another handwriting and under a different signature of the same " Jos Plamondon, H. C. S." and not bearing any date whatever, stating that " on the eleventh day of September instant, " between nine and ten in the morning, I did call and was " assured, by the owner and keeper of the house (Mr. O'Neil) " that John Supple, the Defendant, was there at the time, " and then and there, delivered certified copies of the writ " and declaration, petition and order, at his own domicile, " speaking to a reasonable person, to Mr. O'Neil." The pen has been drawn through the words " writ and declaration," but no mention of erasure of words is to be found in this certificate. The deposition of O'Mara as a witness, is filed of record, as of the 11th September, 1857. It contains a statement that " Defendant and his attorney being called make default ; " the jurat is signed by neither of the honorable judges who made the orders above mentioned, but by the learned Chief-Justice of the Superior Court. On the 21st September, the return day, an appearance as attorney for Defendant was put in by Mr. Duggan. On the 24th September, an *exception à la forme*, or plea in abatement, was put in by Defendant, which was dismissed by the court below, on the 3rd April, 1858. On the 4th June, 1858, a demand of plea to the action was made by Plaintiff, and, on the 19th June, Defendant was foreclosed, and the cause inscribed upon the *rôle des enquêtes*, for the adduction of evidence *ex parte*. It does not appear, by the record, that the cause was even, at any time, called from the roll *des enquêtes*, and no default, in this respect, was entered against Defendant. On the 22nd of June, Plaintiff filed an inscription of the cause upon the roll *de droit*, for final hearing on the

merits, *ex parte*. On the 23rd of June, Defendant tendered issuable pleas, which had been served, and were marked as having been presented at the prothonotary's office on the day the foreclosure was fyled and moved that the default and foreclosure recorded against him be taken off, the cause struck from the roll *de droit* and *enquête*, and to be permitted to file his pleas to the action *upon such terms as this honorable court shall order*. On the 25th June, the parties were heard upon this motion, and a *curia advisare vult* was entered. Notwithstanding this, on the 26th June, the parties were again heard on the merits, and another *curia advisare vult* entered. Nearly five months afterwards, on the 20th November, 1858, two judgments were reudered at the same time, rejecting the motion to file the pleas, and condemning Defendant to pay to Plaintiff £56 3 4, with interest from the 8th. September, 1857, and costs. These are the judgments brought up for revision here. The only proof consists of the deposition of O'Mara, taken on the 11th September. In *Malone* and *Tate*, 2 Lower Canada Reports, 99, this court rejected depositions of witnesses taken before issue joined, although the *declaration and a petition for leave to examine them had been served upon the Defendant*, on the ground, that service at Montreal on the 29th July, was too short notice, to attend at Quebec, on the 31st. The present is a much stronger cause. To pass over the anomaly in the first order, by which the prayer of the petition is granted, and then the party is called upon to shew cause against the granting of it, it must be observed that no notice of this petition, or of either of the orders made upon it was given to Defendant. The first certificate relates to the writ and declaration only, and omits all mention of the petition. The second refers to the petition and *order*, but there were two orders, one for an examination at ten o'clock, the other at noon. Both certificates mention the time of service as between nine and ten in the morning. It is manifest that, even admitting service upon Defendant personnally, between nine and ten, appearance at ten, the same day, was not to be expected, and that sufficient time for preparation was not given him. Nothing short of bringing a party *obtorto collo* could make this a sufficient summons even in a court of *pie poudre*. The second certificate not dated, but signed and written in another handwriting than that of the bailliff, Joseph Plamondon, with words erased and unacknowledged would be mere waste paper. The pretentions that the statement, the *assurance of O'Neil, the owner and keeper of the house, that John Supple was there at the time*, can bind Defendant, is not to be listened to, any more than the attempt to give the Defendant a *domicile in Quebec*, at O'Neil's, to whom neither christian name nor addi-

tion are given. The irregularity of those proceedings continues throughout. The Defendant is defaulted by Mr. Justice Badgley, at *ten o'clock, in chambers,* and the examination of the witness is ordered for *noon, in the court room, in the court house,* but, either no notice of this order was given at all, or notice of both orders was given at the same moment, after the lapse of the hour fixed by the first. The first certificate, relating to the writ and declaration, has no bearing upon the point of service of notice. The second mentions one order, without saying which. Again, the deposition itself asserts that the *Defendant and his attorney were called.* What attorney is not mentioned, but the only appearance by attorney was several days afterwards, on the return day. I lay stress upon the circumstance that the cause was never called from the roll *des enquêtes,* first because it accounts for the absence of a motion by Defendant to reject the deposition, and not because it vitiated the subsequent inscription for hearing. The Defendant moreover tendering an issuable plea, and submitting to any conditions to be imposed upon him, ought to have been relieved from a foreclosure however regular, particularly as he had put in bail to the action. But, apart from the glaring irregularities which I have noticed, there is an objection to these proceedings, which, in my opinion, is insurmountable. The examination of the witness rests upon the 12th section of the *Provincial ordinance* of the 25 Geo. III, cap. 2, which embraces two classes of cases. First : " In cases *of sickness, and when the witness cannot* attend the court," the deposition may be taken," *by any one* judge, in the presence of the " parties, Plaintiff and Defendant, *or their attorneys,* or in " their or either of their absence, *after due notice signified* " *and after issue joined.*" Next, " when any witness may be " about to depart the province, and by which means either " party might be deprived of his testimony." In this last case, which is the one in hand, the examination is to take place *in the manner as above expressed.* A practice was introduced at Quebec, some fifteen or twenty years ago, to examine witnesses before issue joined, and it was supposed to be justified, because the words *before issue joined* were not repeated in the ordinance, in the latter part of the clause above referred to. The repetition of these words is unnecessary. If a sick witness, even in the prospect of immediate death cannot be examined before issue joined, the joinder of issue, *a fortiori,* must precede the examination of a witness, merely about to leave the province; such a witness may return to the province, or he may be examined under a commission, why then should he be examined before issue joined, when, in the other case, such examination is impossible, although the loss of testimony be

irreparable ? Is it to be supposed that the legislature intended to make a difference so important between the two classes of cases ? In the present instance, the declaration had not been served upon Defendant by the sheriff. A copy was left for him at the office, but, at what hour is not said. It contains nothing but the common counts in assumpsit, particulars are only produced on the return day. What system of law can tolerate the examination of witnesses, before the *actor* has stated his case, or the *reus* pleaded to it ? How can the oral examination of witnesses be regulated by the judge, without a demand and an issue of fact between the parties ? It is the *litis contestatio, la contestation en cause,* which makes the cause. The suit only is commenced by process, which brings Defendant into court on the return day, but the cause is formed by the issue raised by the parties, after appearance and plea pleaded. It is true that, by the *procédure* in France, *on pouvait anticiper les délais*, but, the right to do this lay in Defendant, not Plaintiff. Under the old rules of practice of the King's Bench, at Quebec, a Defendant in actual custody had the right to inscribe the cause on the roll *des enquêtes*, and to force on Plaintiff, but this was only after issue joined. The delay alloved to a Defendant to appear is intended to give him time to choose an attorney and to make his defence, can he then be dragged before the tribunal anl thus be made to answer beforehand as he must do if he is to confront his adversary's witnesses, and crosse-xamine them previously to the return day. The construction of the ordinance sought for seems to me repugnant to every sound principal of *procédure*. I cannot understand how a Defendant can be defaulted before the time at which he is summoned to appear by the first process. I know of no authority to give countenance to the practice contended for, which seems to me subversive of the right of a fair defence, and in cases of *capias* to impose hardships upon strangers who are Defendants in our courts, not to be tolerated in a civilized community. By what rule is the materiality of a question, either in examination or cross-examination to be determined, and how could an indictment for perjury be sustained, when the materiality or immateriality of the evidence is contingent upon the nature of the issue, only to be raised and perfected subsequently to the examinaon of the witness. If an express enactment to this effect were to be found upon the statute books, barbarous though it might be, it would have to be obeyed, but I am unwilling to believe, more particularly after the case of *Malone* and *Tate*, that the practice contended for in the present case, would be sanctioned by the legislature. Process in the nature of *ne exeat regno*, to prevent the witness from leaving the province, tyrannica

though it would be, would be more consistent with *procédure* to my mind than to force a Defendant to evidence or trial, before issue joined. In this case, Defendant was so situated as not to have time to choose attorney or counsel before the testimony was taken against him, upon which alone he was condemned. I am of opinion that a denial of justice has been operated by the proceedings in the court below, and I would, therefore, reverse the judgment appealed from, and would set aside the testimony of the witness O'Mara and order the pleas tendered by Defendant to be placed of record and filed. I must therefore dissent from the judgment about to be rendered.

MEREDITH, Justice: The first question to be considered is this: can a witness, who is about to leave the province, be examined before the return of the writ of summons, under the 12th sec. of the 25, Geo. III, cap. 2. The general practice in Quebec has been to allow a witness to be examined under the circumstances above stated; and I think this practice is strictly in accordance with the express terms of the ordinance. Under the first part of the 12th section, witnesses prevented from attending court by sickness cannot be examined before a judge *until after issue joined*; but there is no such restriction as to the examination of witnesses about to depart the province. The last mentioned witnesses may, it appears by the latter part of the 12th section, be examined at any time *after the institution of the cause*, by which expression, I think, the suing out of the writ must be understood. Assuming that an order could legally be made in the present case for the examination of the witness Thomas O'Mara, the second question is: ought not his deposition to be set aside, in consequence of the insufficiency, as well of the service upon Defendant of the Judge's order, as of the bailiff's return respecting that service? Judge Chabot, by an order made on the 10th of September, 1857, required Defendant to show cause, the following day at 10 A. M., against the granting of an order for the examination of O'Mara. The order so made was not served until between 9 and 10, on the 11th, and the bailiff, in his return which is endorsed on the petition, certifies that he served a copy of "le writ et la déclaration ci-annexée," instead of saying that he had served a copy of the petition and order. It is more than probable that the bailiff intended to say, "the petition and order," because it was upon those papers he made his return; moreover the copy of the writ and declaration had been served before the date either of the petition or order. Under these circumstances, although I have but little doubt that Defendant did, in fact, receive a copy of the petition and order, I, nevertheless, think he would have had good ground for moving in the court below for the rejec-

tion of O'Mara's evidence ; but, as Defendant, who in a suit for wages, was before the Superior Court for more than a year, never made any such application, I think he must be held to have waived his right to object to the irregularities above complained of, and that this court ought not to revise orders made *by a Judge in vacation, which were never complained of in the court below.* I am aware that, in *Malone* and *Tate*, depositions of witnesses about to leave the province were rejected, on account of their having been taken before the return of the writ, but the judgment in that case, as was admitted at the time it was rendered, was contrary to the practice which had obtained for a considerable time in the district of Quebec, and, as, in addition to this, that judgment appeared to the Judges of the Superior Court in this district to be contrary to the letter and spirit of the ordinance, they continued, so far as I am aware, to observe the old practice. About four years after the judgment in *Malone* and *Tate*, the question now raised was brought under my consideration, in *Watson* vs. *Baldwin*, and, after consulting Mr. Justice MORIN and Mr. Justice BADGLEY, and, with their concurrence, I allowed a witness who was about to leave the province to be examined before the return of the writ. Mr. Justice CHABOT, in October, 1857, made a similar order in the case of *Graham* vs. *Taylor* ; and the same course was pursued in the present case by Mr. Justice CHABOT and Mr. Justice BADGLEY. Upon the whole, I am of opinion that the judgment of the court below ought to be confirmed, as being in accordance with the practice of the court, and the letter and spirit of the ordinance.

MONDELET, C., Justice : Three questions arise here : Firstly, a witness alleged and sworn to be about leaving the province, was examined after the service, but before the return of the action, is such a proceeding legal ? Secondly, supposing it to be legal, and admitting that a judge had a right to grant an order against Defendant to shew cause, within an arbitrary delay, why such witness should not be examined, could this Defendant be so proceeded against, under a service not of the *petition and order*, but under the certified return of the bailiff that he served the *writ and declaration*, which is to be presumed to have meant *petition and order* ? Thirdly, admitting the above to be an irregularity which of itself, if not corrected, was fatal, could such an irregularity be corrected by the certificate of a bailiff without any date to it ? Upon the first question I have no doubt. The court had not, nor had any judge, jurisdiction over Defendant, until the action was returned into court. *No instance* until then. The Defendant was not before the court. So determined and decided, correctly in my opinion, in appeal, by the honorable

Judges ROLLAND, PANET and AYLWIN, on the 11th Oct., 1851, in the case of *Malone* and *Tate*. The second question does not admit of a doubt, there has been no service of the *petition and order*. The court has no right to substitute its mere arbitrary supposition to the express, distinct and plain wording of the certificate of the bailiff, that he served the *writ and declaration*. If courts were to arrogate to themselves such dangerous powers, no one would be safe for a moment. As to the third point, it is of such elementary clearness, that it is an insult to common sense to discuss it; a return without a date is, of course, no return. But because it appears by the record, that Defendant when before the court, never moved to have the deposition taken before the return of the action rejected, and that he filed exceptions, it does not logically follow that he waived his right of complaining of the illegality of such a proceeding, but it shows that he allowed the case, thus to proceed, with manifest and glaring irregularities, without taking immediate objection, and that he wants now to set aside the whole of the proceedings from and including Judge Chabot's order of the 10th September, 1857, and that the parties be ordered to proceed *de novo*, on payment of each their own costs, both here and in the *Cour de première instance*, and it must be admitted that this pretension is supported by the decision in the case of *Malone* and *Tate*, and such should be, I think, *pari ratione*, the judgment in the present case.

DUVAL, Justice: The court is called upon to decide whether a Plaintiff has a right to examine a witness after the issuing of process, and before issue joined? Three of the Judges are of opinion that he has that right. This opinion appears to me to be founded on the very letter as well as the spirit of our provincial law. The act of 25 Geo. III, cap. 2, sec. 12, provides for two cases. The first is the case of sickness, when the witness cannot attend the court. In such a case, the order allows the examination of the witness *after issue joined*. The second is when a witness is about to depart the province, whereby either party may be deprived of his evidence. Here the party is allowed to examine this witness in every cause *instituted*. The distinction is clear and founded on reason. Remark it is made in one and the same clause. It has been recognised by the courts for a quarter of a century to my knowledge, and constantly acted upon. A late decision to the contrary has been referred to. If this decision has been correctly reported, which is doubtful, for it was denied a few days afterwards we cannot set aside the judgment pronounced for years, because we are told that one judgment to the contrary has been given. Our opinion is clearly and decidedly in favor of Plain-

tiff, and it is based upon the very words of the clause above referred to.

SIR L. H. LAFONTAINE, Bart., Chief-Justice: I have had some difficulty in arriving at a conclusion in this case, in consequence of the decision in *Malone* and *Tate,* but, inasmuch as I am assured that the practice since has always been against that decision, I concur in the opinion of the learned Judges who are in favor of confirming the judgment of the court below.

Judgment confirmed. (10 *D. T. B. C.*, p. 457.)

DUGGAN, W. E., for Appellant.

JONES and HEARN, for Respondent.

COMPENSATION.

SUPERIOR COURT, Québec, 2 octobre 1860.

Before TASCHEREAU, Assistant-Judge.

RYAN et al. *vs.* HUNT et al.

Jugé : Dans une action sur un billet promissoire, qu'un plaidoyer alléguant qu'à l'échéance du billet les Demandeurs avaient entre les mains des effets appartenant aux Défendeurs de la valeur du billet, et que la dette était en conséquence compensée, ne vaut, et que la valeur d'effets et de marchandises ne peut être opposée en compensation à une demande pour une somme d'argent. (1)

Action or promissory note for £2000 0 0, made by Langlois & Co., and endorsed to Defendants, who endorsed to Plaintiffs who brought suit. Plea, that, at the time the note became due, Plaintiffs had goods, wares and merchandize in their possession belonging to Langlois & Co., for more than the value of the note; and, secondly, that Plaintiffs had in their possession, at the time the note became due, money belonging to Langlois & Co., for more than the amount of the note, and that the debt was thereby compensated. The Plaintiffs demurred to the first count of the plea, on the ground that possession by Plaintiffs of goods and merchandize belonging to Langlois & Co., was not the subject matter for a plea in bar to a money demand; and to the second, as not being sufficiently specific in not setting forth time and place, and the amount of money alleged to be in the possession of Plaintiffs.

VANNOVOUS, in support of demurrer: The first count of the plea is bad as not shewing in what capacity Plaintiffs hold the goods, wares and merchandize, whether as bailees or otherwise; and the second is equally bad for want of sufficient

(1) V. art. 1188 C. C.

particulars in not setting forth the time and place at which the monies were given.

PARKIN, *contra*: The goods and money being in the possession of Plaintiffs, they are necessarily acquainted with all the particulars which they now seek, and when the facts are within the knowledge of the adversary, it is not necessary to plead or set them forth with the same strict accuracy as otherwise. (1)

TASCHEREAU, Justice: The first count of the plea is bad in not setting forth the nature of the goods, wares and merchandize alleged to be in the possession of Plaintiffs; there is nothing in this count to shew a debt *claire et liquide* by which compensation can be pleaded, and the demurrer is maintained in so far as regards this count of the plea. (10 *D. T. B. C.*, p. 474.)

VANNOVOUS, for Plaintiff.

ANDERSON and PARKIN, for Defendants.

NOVATION.

COUR SUPÉRIEURE, Québec, 5 octobre 1860.

Présent: STUART, Juge.

NOAD et al. *vs.* BOUCHARD et al.

Jugé: Que l'acceptation d'un billet en renouvellement d'un billet antérieur, n'est pas une novation, à moins qu'il n'y ait intention expresse d'effectuer telle novation. (2)

L'action fut portée sur un billet promissoire en date du 1er février 1858, pour la somme de $400.00. Deux des Défendeurs, Glover & Fry, firent défaut, et l'autre, Bouchard, plaida que le billet en question avait été fait par lui, payable à son ordre, et ensuite endossé et livré à Walker & Bouchard, de laquelle société il était un des membres, et par cette société endossé et livré aux autres Déferdeurs, Glover & Fry; que ce billet fut subséquemment renouvelé à quatre différentes reprises, en faveur de la sociéte Walker & Bouchard, par Glover & Fry; et qu'ensuite, à l'échéance du dernier de ces billets, la somme de $50 avait été payée à compte, et un autre billet d'un nommé D. A. Bouchard, le frère du Défendeur, en faveur de Walker & Bouchard, avait été accepté par Glover & Fry en paiement de la balance; et qu'à l'échéance de ce dernier billet, la somme de $50 avait été payée acompte, et un autre billet de D. A. Bouchard avait été accepté par Glover & Fry

(1) Chitty, *on Pleading*, p. 222.

(2) V. art 1171 C. C.

en paiement de la balance de $300.00 ; et que tous ces billets avaient été respectivement donnés et transportés à Glover & Fry, en renouvellement et paiement du billet sur lequel l'action était fondée ; et particulièrement les billets de D. A. Bouchard qui n'avait jamais eu aucune considération ou valeur pour les deux billets ainsi consentis par lui ; et qu'en conséquence il y avait novation de la dette. Il fut prouvé que tous les billets donnés en renouvellement furent remis à *Walker & Bouchard*, mais que *Glover & Fry* avaient toujours gardé le premier billet, lequel ils avaient transporté pour valeur reçue aux Demandeurs.

CASAULT, pour les Demandeurs : Les billets donnés en renouvellement n'ont pas opéré novation, parce qu'ils n'ont pas été acceptés par *Glover & Fry* en paiement, mais seulement comme sûreté collatérale ; et, pour opérer novation, il faut qu'il ait intention de faire telle novation. (1)

STUART, Juge : *Glover & Fry* ont accepté les billets en renouvellement seulement, comme sûreté additionnelle, et, conséquemment, l'on ne pouvait leur plaider novation, et, si l'on ne pouvait leur plaider novation, ce moyen de défense ne peut être invoqué à l'encontre des Demandeurs. Pour constituer novation, il faut qu'il y ait intention d'effectuer telle novation, toutes les autorités citées établissent ce principe bien clairement. Si Bouchard avait l'intention de faire novation, il aurait dû demander à *Glover & Fry* de lui remettre le premier billet. Action maintenue. (10 *D. T. B. C.*, p. 476.)

CASAULT et LANGLOIS, pour les Demandeurs.

FOURNIER et GLEASON, pour Bouchard.

DEPENS.—REVISION.

SUPERIOR COURT, Quebec, 2nd October, 1860.

Before TASCHEREAU, Assistant-Judge.

KERR *vs.* GUGY.

Jugé : 1° Que la cour examinera les termes d'un jugement de la Cour d'Appel afin de constater quels frais ont été accordés.

2° Que lorsque la Cour d'Appel, dans une action en dommage pour la somme de £5000, accorde au Demandeur la somme de £2 10, avec dépens, le Demandeur n'a droit qu'aux frais comme dans une action de la Cour de Circuit pour ce montant.

3° Que les frais accordés seront, sous la 12e Vict., cap. 38, sect. 82, réglés par le montant du jugement rendu, à moins que par les termes

(1) Nouguier, *Lettres de change*, nos 602, 603 ; 2 Alauzet, *Droit commercial*, n° 524 ; 1 Pardessus, *Droit commercial*, n° 221 ; 4 Pothier, *Contrat de change*, n° 120 ; 7 *R. J. R. Q.*, p. 218 ; *Brown* vs. *Mailloux*.

du jugement il n'apparaisse qu'il était de l'intention de la cour d'accorder des frais plus considérables.

4° Qu'une partie qui fait motion pour reviser certains items taxés par le protonotaire. abandonne le droit d'objecter aux autres items; et une motion pour reviser ces derniers items sera rejetée, quoique la partie faisant cette seconde motion offre d'en payer les frais.

The Plaintiff sued Defendant in damages for libel, for the sum of £5000 0 0. The Defendant by an incidental cross-demand, claimed a similar amount from Plaintiff. The Superior Court dismissed both actions, each party paying his own costs. From this judgment Plaintiff Kerr appealed. The Court of Appeals reversed the judgment. and awarded Kerr the sum of £2 10 0, damagess with costs. The prothonotary taxed Plaintiff's bill of costs, awarding him the sum of £12 10 0, as attorney's fee, being the fee of a first class action in the Superior Court.

Gugy, for Defendant, moved to revise the taxation contending, that, inasmuch as judgment was only rendered for the sum of £2 10 0, Plaintiff's fee should only be 6s. 8d. the fee of the lowest class in the Circuit Court, according to the 12th Vic., cap. 38, sec. 82.

Kerr, for Plaintiff, maintained that, inasmuch as the Court of Appeals had not mentioned in its judgment that the costs should only be as of the lowest class in the Circuit Court, but had used the words costs generally, the taxation of the prothonotary was correct, and he was entitled to a fee according to the amount sued for, and not according to that for which judgment was rendered.

Taschereau, Justice: The eighty-second clause of the statute cited provides that costs shall be awarded according to the class or sum for which judgment was rendered, and not according to that demanded, unless the court in which the action is brought order otherwise. Now, I have carefully examined the judgment in appeal, and I find nothing in the language of the judgment to shew that it was the intention of the court to impose costs of the highest class in the Superior Court on Defendant; or in other words that Defendant should pay all the costs. There is nothing in the language of the judgment to warrant me in departing from the provisions of the clause of the statute above referred to, seeing that the Court of Appeals, although it had the power to do so, has not awarded costs of a higher class than that for which judgment was rendered. The motion is therefore granted.

Gugy, for Defendant, subsequently, moved to revise the taxation of other items in the bill of costs, and offered to pay the costs of the motion, inasmuch as he had omitted to include these items in the first motion.

KERR, for Plaintiff, contended that the omission to ask for the revision of these items in the first motion operated as a waiver of Defendant's claim to have them reduced.

TASCHEREAU, Juge : Vu que le Defendeur par sa première demande en revision de la taxe du mémoire de frais, a obtenu cette revison, et que, par cette première demande, le Defendeur ne se plaignait pas de l'illégalité de la taxe des items qui font le sujet de la présente demande en revision, et qu'en loi il ne peut y avoir qu'un appel en revision de la taxe de frais faite par le protonotaire pour tous et chacun des items d'un mémoire de frais, la cour renvoie la présente motion. (10 *D. T. B. C.*, p. 478.)

KERR, for Plaintiff.
GUGY, for Defendant.

CONTRATS.—INTERPRETATION.—MARINE INSURANCE.

PRIVY COUNCIL, ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, 2nd and 3rd December, 1862.

Present : Lord CHELMSFORD, Lord KINGSDOWN, and Sir JOHN TAYLOR COLERIDGE.

THE BEACON LIFE AND FIRE ASSURANCE COMPANY, Appellants, *and* JAMES GIBB AND OTHERS, Respondents.

In order to construe a term in a written instrument, when it is used in a peculiar sense, differing from its ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the term, but evidence is not admissible to contradict or vary what is plain.

The word "premises," although in popular language is applied to buildings, in legal language, means the subject or thing previously expressed.

A policy of insurance against fire was effected on a ship. The policy contained a proviso to the effect, that it and the insurance thereby made should be subject to the several conditions and regulations thereto and thereon expressed, so far as the same were or should be applicable, one of these conditions (all of which were primarily intended to apply to the insurance of houses and buildings and were in the form used for that purpose), provided amongst other things, that if more than twenty pounds weight of gunpowder should be "on the premises" at the time when any loss happened, such loss would not be made good.

Held : That the proviso in question was, under the circumstances, applicable to tne case of the ship insured.

This was an appeal from a judgment of the Court of Queen's Bench in Lower Canada, reversing a judgment of the Superior Court of that province in an action brought by Respondents against Appellants upon a policy of insurance against fire to the extend of £1,000. The policy was on the steam-vessel *Tinto*, the property of Respondents, described a *Nona* lying at Sorel, to ply between Quebec and the Upper Lakes,"

and contained the following proviso, " that this policy, and the insurance hereby made shall be subject to the several conditions and regulations herein and hereon expressed, so far as the same are or shall be applicable, in the same manner as if the same respectively were repeated and incorporated in this policy." The conditions in question, fifteen in number, which were endorsed upon the policy, were framed and primarily intended to apply to houses and buildings, and contained, among other stipulations, the following condition. No. 7 : " No loss occasioned by or through any invasion, rebellion, riot, tumult, insurrection or commotion, or by or though any military or usurped power or foreign enemy, will be made good, nor any loss by theft at or after a fire ; books of accounts, deeds, writings, manuscripts, securities, bills, bonds, ready money, and gunpowder, are not, under any circumstances, assured. The company will not be responsible for any loss arising on hay or corn destroyed or damaged by its own natural heating, but will pay the loss which may happen to any other contiguous property assured in consequence of fire so occasioned. No loss will be allowed for any goods or utensils which may be destroyed or damaged while undergoing any process of manufacture in or by which the application of fire heat is used. The company is not responsible for or liable to pay any loss or damage occasioned by or though any explosion ; and if more than twenty pounds' weight of gunpowder shall be upon the premises at the time when any loss happens, such loss will not be made good. The use of gas-lights is allowed, provided the gas is not made on the premises ; but this company will not be responsible for any loss or damage occasioned by or through the use of camphene." On the 17th of July, 1850, the *Tinto* whilst on her voyage from Quebec, was destroyed by fire, having at the time on board a quantity of gunpowder exceeding the weight mentioned by the above conditions. Respondents sued Appellants in the Superior Court for the sum insured. The declaration set out the policy, and averred a loss by fire, and claimed judgment for £1000, being the amount of the policy, with interest. Appellants pleaded a *défense au fonds en fait*, and by a perpetual peremptory exception, *péremptoire en droit*, alleged three grounds of defence, the first and only material one being, that the policy was made subject to certain conditions and regulations therein and thereon expressed, by which it was, amongst other things, agreed between Appellants and the owners of the property insured by the policy that if more than twenty pounds' weight of gunpowder should be upon the premises at the time when any loss should happen, such loss would not be made good ; and that at the time when the steam-propeller

was destroyed by fire, there was on board of the vessel a larger quantity of gunpowder than twenty pounds' weight, by reason whereof Appellants were not reponsible for any loss which Respondents, or the persons in whose favour the policy was made, might have suffered by reason of the fire. Respondents, by their general answer to the perpetual exception, denied the allegations contained in it in fact and in law. Appellants replied, and issue being joined, declared their option of a trial by jury, whereupon the question to be submitted to the jury were settled in accordance with the practice of the court, as prescribed by the Provincial Statute, 14th and 15th Vict., c. 89, sec. 4, by Mr. Justice MEREDITH, before whom the cause was afterwards tried. The questions, which were eight in number, were entirely of fact, and the jury answered all in the affirmative, and found that the policy had been executed, that the *Tinto* had been destroyed by fire whilst covered by it, and that satisfactory proof of the loss had been made to an amount exceeding the sum insured. The third question submitted to the jury was as follows : "At the time the steamer *Tinto* was so consumed by fire, was there any quantity of gunpowder on board the steamer; and if so, what weight or quantity ?" To this, the jury answered : " Yes ; we find that a package containing about one hundred pounds of powder was on board as freight, and which the owners of the steamer were not precluded by their policy from carrying." At the trial Plaintiffs offered evidence to prove that it was customary to carry on freight gunpowder in crafts navigating the inland waters of the province such as the *Tinto*, but the evidence was ruled inadmissible by the Judge. After the trial Appellants having set down the cause for having upon the merits, moved the Superior Court in the following terms : " That, inasmuch as the jury before whom this cause was tried, on the 29th of April last, were in answer to one of the question submitted to them, required to find what quantity or weight of gunpowder was on board of the steamer *Tinto* at the time of her loss ; and inasmuch as the jury, finding and stating such quantity or weight, have added to their answer a further statement or finding to the effect that the gunpowder was carried as freight, and that the Plaintiffs were not restricted by the policy from carrying it ; and inasmuch as such further statement or finding was was not pertinent to the pleading and did not flow from any matter raised by the pleadings in the cause, inasmuch as the right of the Plaintiffs to carry the weight of gunpowder was not submitted to the jury, and by reason thereof such additional statement or finding aforesaid is illegal, irregular and unwarranted ; the same be rejected suppressed and set aside,

with costs." This motion was heard and reheard several times; and ultimately on the 1st of June, 1859, the Superior Court at Quebec gave judgment in favour of the motion, and ordered that the additional finding or statement of the jury complained of in the motion should be suppressed and set aside, with costs, and give final judgment for the present Appellants dismissing the action with costs. Against that judgment the present Respondents' appealed to the Court of Queen's Bench for Lower Canada. The Judges of the Court of Queen's Bench differed in opinion. The Chief-Justice, Sir LOUIS H. LAFONTAINE, and the Puisné Judges, MONDELET and BADGLEY, being of opinion that the jugdment of the Superior Court should be reversed; and the other Judges AYLWIN and DUVAL being of opinion that it should be affirmed. The majority being in favor of Plaintiffs below, the judgment was reversed and given for the Plaintiffs below, for the amount of the policy and costs. The reasons given by three of the learned judges for their judgment, were in substance as follows: Mr. Justice MONDELET, observed: There are two questions which may as well at once be inquired into: First, do the words "upon the premises" apply to a steamer? It is evident that the form of the policy which has been used is one which was used with respect to houses and buildings or immoveable property. It is, therefore, one which should not have been made use of relative to a seteamer. But inasmuch as this policy, though improper, has been accepted by the insured, and that they must be taken to have read it since they have signed it, it is right and just that the word "premises" should be interpreted against them, and adjudged to refer, between the parties, to the steamer, which was the object, the sole object insured. Secondly, such being the interpretation which, in my opinion, should attach to the seventh clause, was it within the province of the jury to add, in answer to the third question put to them, "Yes, we find that a package containing about one hundred pounds of powder was on board as freight, and which the owners of the steamer were not precluded by their policy from carrying?" I answer, No. Because the question as to wether they had a right to carry as freight or otherwise any amount of powder was one for the court, and not for the jury, who have assumed a power which they do not possess; they have transcended both their own attribution, and the question put to them, which was purely and simply, "at the time the steamer *Tinto* was so consumed by fire, was there any quantity of gunpowder on board the steamer; and if so, what weight or quantity? It was at the hearing contended that the jury, by using the word "powder" in their answer, did not assert that there was any gunpowder on board the steamer." This flimsy pretension is

easily set at rest. Being asked whether there was any quantity of gunpowder on board, they answer, " yes." The word " powder," therefore, which they use, they must have intended to mean gunpowder; otherwise they would not have answered touching an object which they were not questioned about. But does it follow that because there was gunpowder on board, over 20lbs, that Appellants (present Respondents) have lost their recourse against Respondents, who have not proved that the fire was occasioned by that powder? Such insurances are to be carried out in good faith, it will be said, and it is unjust that the insured, who pay their premium regularly, should lose their property, and the amount of the insurance, when the fire has not been the result of what is charged upon them as a violation of one or more of the conditions inserted in or on the policy. On the other hand, it might be said that if courts of justice bind down the insurance company to prove that the fire was caused by the very thing which the insured was prohibited having on the premises, it may happen that in such cases when the fire has thus been the result of the violation of the policy, the insurance companies will have to pay the amount insured, which would be unjust, it being oftentimes impossible to trace the fire to any cause. Still I incline towards a fair and liberal view of this matter, and I prefer adopting the course which was the *motif* in the judgment of this court at Quebec in the case of Goldsmid et al. &c., on 18th January, 1854 (before ROLLAND, PANET, AYLWIN and MONDELET, Justices). Correctly did Mr. Justice ROLLAND remark that it is a *contrat aléatoire*, and it must be carried out in good faith. In England, omissions, &c., by themselves might have been fatal, but in our system it requires proof of deception and fraud, and a further proof that by such cause the fire has extended! And rightly was it ruled by the court that when there is no evidence of bad faith, concealment, fraud, or negligence, and no proof that the fire was caused by what was prohibited, the insured should not lose his insurance. This is consonant to the spirit of our laws and jurisprudence, and strictly just. It appears to be admitted by writers on the *Code de commerce*, that previous to the ordonnance of 1681, and up to the *Code de commerce*, there was *beaucoup d'incertitude* as to whether concealments by *réticences*, when they had not been the *causes* of the *sinistre*, operated the nullity of the policy, or that it was only the *Code de commerce* that put an end to those *incertitudes*. Those who since have shown themselves so very rigorous have evidently written under the influence of the *Code de commerce*. There is not a word on this point in the *Ordonnance* of 1681; so much so, that even *Pothier* treats those *réticences* as in *fore conscientiæ* (Traité du contrat

d'assurance, tome 3, ch. 3, s. 3, n° 193.) As to those (one or two) who gratuitously speak of the jurisprudence on that point, they should have taken the trouble to prove their assertions; they did not even attempt it, very likely for the best of all reasons. *Pothier* has been more prudent, more modest and true. Supposing there had been such a jurisprudence, it would after all have been posterior to the Ordonnance of 1681, and not in the least guiding here even if correct. But there does not appear to have existed such a jurisprudence. At all events, such a jurisprudence would, in my opinion, have been a very erroneous one. The only temperament, in such a matter, the only just one, would be on the part of the insurer to claim a deduction from the amount to be paid to the insured, the difference in the premium, *id est* in the amount additional, which the insurer would have demanded if such greater risk had been mentioned. Now, as to what the jury added in their answer to the third question put to them, I think it should be held to be mere surplusage, and as *non avenu.* I really do not understand why the party went to the trouble of making a motion to have that part of their answer struck out; it was an out of the way proceeding; and I much less understand how the court should have so hesitated, and ordered so many rehearings. As to the final judgment, I think it is wrong: first, in having granted such a useless motion; secondly, in having dismissed the Plaintiff's action; thirdly, it being not at all the judgment which is rendered in such cases. The court went into the merits of the exceptions, &c. *Ce n'est pas là la manière de décider.* The judgment should have been grounded upon the verdict simply. It is moreover my opinion, that there was no necessity for a new trial; Plaintiffs do not require a new trial, they want a judgment upon the verdict, and there ought to have been, and there ought now to be, a judgment in their favour upon the verdict, for £5,000.

The Chief-Justice, Sir Louis H. LaFontaine added that the decision in the case of Goldsmid, in his opinion, applied to the present case, and concurred in the conclusion arrived at by Mr. Justice Mondelet.

Mr. Justice Badgley: It must be remarked that the policy in every particular, its stipulations, conditions, and provisoes with the sole exception of the description of the subject of the insurance, was solely and simply a land policy, used and issued for insurance against fire of houses and buildings. It contained all the usual and known conditions, provisoes and limitations inserted in such instruments and notoriously adopted by insurance offices transacting such business in this province, and taking risks against fire upon

houses and buildings. Amongst the stipulations contained in the policy was that in the seventh condition (which he stated and continued) without adverting to the other objections raised by Defendants in this action, the chief and main objection is, that at the time of the accident there was on board the steamer more than 20 lbs of gunpowder. As already observed the condition in this respect is one of those which notoriously belong to policies for houses and buildings, and the propriety of such condition for such subjects need not be denied, " if more than 20 lbs of gunpowder be found upon the premises at the time," &c., naturally intending that such quantity of gunpowder was usually kept in such houses and buildings for use by the occupants or the family, &c., necessarily increasing the risk. But in this case, it must be remarked, that the steamer in question was a steam freight propeller, so acknowledged by Defendants themselves in their policy and that the fact of the gunpowder being on board at the time of the accident is settled by the verdict and finding of the jury, neither objected to by Defendants nor interfered with by the court, and is qualified by the finding to the third articulation of facts. The gunpowder on board was not there as being in a house or building, to be kept there for use, but as freight for transportation from one place to another by a freight steamer. Now, this fact is not one intended by the court, but has been distinctly found by jury and forms port of the record. Moreover, the policy contained the following proviso : provided always, that this policy and the assurance hereby made shall be subject to the several conditions and regulations herein and hereon expressed, so far as the same are or shall be applicable, in the same manner as if the same respectively were repeated and incorporated in this policy. It is manifest from this proviso that the conditions and regulations expressed in the policy are not absolute and positive ; they are conditions and regulations only so far as they are applicable, and for their applicability they are dependent upon the subject of the insurance, a freight steamer which is thus described in the policy. The hull, tackle, apparel, and other articles of outfit, including boats, furniture, linen, plate, glass and earthenwere, engine and machinery, of the steam propeller *Tinto* now lying at Sorel, to ply between Quebec and the Upper Lakes, including winter risks, refitting in the spring. Fires allowed to be made during the continuance of the present policy. Now, can it be said that the condition as to the 20 lbs of gunpowder being found upon the premises, a house or building applies to this steamer ? As mere freight more than 20lbs would be as little dangerous, as that precise quantity whilst in a house or

building, 20 lbs would be quite as dangerous as a larger quantity, the applicability of the condition and regulation in this respect is not striking. But the contract is to be construed according to the intention of the parties at the time of its entry upon and moreover is to be subject to good faith on both sides. Whether a specific article or thing is covered by a policy must be inferred from its context is a rule in favour of insurers, and it is also a rule as certain for the insured, that conditions in policies are to be construed strictly against those for whose benefit they are introduced when they impose burdens on the parties. The reason is manifest; the insurer has always the means at hand of conditioning his risks; it is his business to protect himself, which he can always do upon a point material to the risk he undertakes. Defendants issue a land policy for a house or building, which they endeavour by their plea to fit to the insurance of a freight steamer. It must have been known to them, as it was notorious generally, that gunpowder was an article of freight and transportation from one part of the Province to the other. They receive and hold the premium upon a freight steamer and object to the condition applicable strictly to land subjects. They urge the condition as absolute, in the face of their own proviso, which makes that condition dependent upon the whole contract for its construction, and which at any rate raises more than an extreme doubt of its applicability to gunpowder as freight upon the *Tinto*. The law of insurance requires *uberrima fides* from the insured. The like is or should be imposed upon the insurers who should have stipulated their refusal to allow gunpowder to be carried as freight. It was in their power to condition their own risk in this respect and to render the condition plain, precise and positive, instead of leaving it uncertain and doubtful, and contrary to law, casting the doubt from themselves upon the insured. The rule of law should be held against them. The construction of the contract must be strictly against those for whose benefit the conditions are introduced when they impose burdens on the parties; otherwise fraud would be paramount to the exclusion of good faith. By the light of these rules, and by consideration of the facts of the case, the contract between the parties may be fairly read as follows: We will insure your freight steamer. We know that gunpowder is an article of freight and transportation in steamers; but if you keep on board for use more than 20lbs, and the vessel take fire, we shall not be responsible for the loss. Under this impression the judgment appealed from does not appear to me to be correct."

Mr. Justice AYLWIN, after stating the plea of exception set up by the Appellants and that the proviso in the

policy applied to all the conditions included thereon, observed: "Appellants contend, that the seventh condition is not applicable to the present case, and that the words "upon the premises" cannot be made referable to a steamer; that this condition refers to houses and buildings, which are commonly known as "premises" in ordinary parlance. Such a pretension comes late after verdict upon the third question submitted to the jury, as settled and determined by the judge. Why try an issue of breach of the condition, if there were no such condition at all? If the assured were desirous of questioning the construction of this portion of the policy, the point ought to have been expressly referred to the court for decision so far from this having been done, it never could have arisen at all upon this record if the jury had not strayed beyond the question, and added the objectionable matter struck out by the court. But if the point had been made, it cannot be doubted that the condition as to the gunpowder is as applicable, if not more so to a steamer as it would be to houses or buildings. If this condition did not apply to the steamer, she might have been freighted with gunpowder to any extent, and yet be at the risk of the insurer. It is unreasonable to suppose that, with a printed condition excluding generally gunpowder in quantities above twenty pounds, an insurance office would allow an exception tacitly to be made in the case of a steamer "plying between *Quebec* and the *Upper Lakes.*" The word "premises" again according to Dr. Johnson, is used as expressive of "houses or lands;" only in law language its natural and appropriate signification is "propositions antecedently supposed or proved." As in the case of a house or building to be insured they would be signified by the word "premises," so where a steamer is antecedently made the subject matter of insurance, the word receives a necessary application. Another not very dissimular quibble has also been resorted to by the Appellants upon the word "powder," as used by the jury in answer to the question in which "gunpowder" is made the subject of inquiry. Appellants have also contended, that as the breach of the condition as to gunpowder was "neither the proximate nor the remote cause of the loss," they are entitled to recover notwithstanding. This point again was not referred as a question of fact to the jury, and their answer to the second question of "Yes, on 17th day of July, 1856," affords no adequate ground for raising it. But, granting that this point can now be urged, it cannot be available to Appellants; if Respondents have stipulated an exemption from liability upon breach of the condition referred to under the aleatory contract of insurance, a risk did not attach at all, and the claim of Appellants fails. The modern french text writers

on insurance have entered into disquisitions upon proximate and remote causes of loss, but their books cannot be received as authority here. The system upon which they write is of comparatively recent introduction in modern France; and the doctrines of insurance had been too long established in *Lower Canada* before the appearance here of any of these works to admit of being shaken by such speculations, for they amount to no more. The conditions of a policy of assurance are to be viewed by us as they are and have been in the courts in England, and they have always been so construed in our courts here. It would be dangerous to colonial commerce to suppose the existence among us of substantial differences in the construction of the form of policy which we have adopted from Great Britain. Upon cardinal points of liability no modern innovation can now be adopted to charge insurers without the legislative sanction. Appellants can only enforce the contract upon which they sue in manner and form as they have entered into it. By its very terms Respondents are declared "not liable to make good the loss sustained." I am, therefore, of opinion, to affirm the judgment of the court below, and to condemn Appellants to pay the costs of the present appeal."

Mr. Justice DUVAL (who agreed with Mr. Justice AYLWIN,) after referring to the opinion given by him in the case of *Anderson* vs. *The Quebec fire Insurance Company*, proceeded in these terms: "The judgment of the Superior Court is based on the verdict. The jurors have found that about one hundred pounds of powder was on board of the steamer at the time of the fire, adding, which the owners were not prevented by their policy from carrying! Appellants argue, that jurors have a right to return a general verdict. To this there are two answers! First, our provincial statute of 1851, the 14th and 15th Vict., c. 89, s. 4, enacts, that the trial of the issue shall not be fixed until the court, or two judges thereof, shall have determined upon and defined the facts to be enquired into by the jury, who shall in every case be required to return a special verdict in relation to such facts. From this it is evident that, the verdict must be special, and that the inquiry of the jurors is limited to the facts set forth in the questions submitted to them. In this case, the jurors were not called upon to put their interpretation on the contract, The judge would have been justified in refusing to receive this part of the answer. Having received it, the court is bound to reject it as a finding, not of a part submitted to the jurors, but as the interpretation of a contract, a question of law not submitted to them. Secondly, in England, where jurors may insist on giving a general verdict, they are not allowed to interpret contracts or written instruments. Whenever they have insisted on so doing con-

trary to the opinion of the court, their verdict has been set aside, and a new trial granted. The necessity of ordering a new trial in England, in the case of a general verdict, need not be explained. In the case of a special verdict, it is otherwise. The facts are found, and a case submitted for the opinion of the court. In Lower Canada, since the statute of 1851, above referred to, the verdict is special. All the facts required for the decision of the cause are found by the jury, and the court is enabled to pronounce its judgment."

From this judgment reversing the judgment of the Superior Court, the Appellants appealed to Her Majesty in council.

Mr. MANISTY, Q. C., and Mr. J. BROWN, for Appellants.

The question upon this policy is simply one of construction, to be determined by the english and not by french law. It is, what is the true construction of the policy and the meaning and intention of the parties? No question as to the effect of a local law can arise, for there is no authority either in french or english law to set aside a plain written contract. Now, the seventh condition absolutely exempts Appellants, the assurance company, from making good any loss, in case more than twenty pounds weight of gunpowder should be on the "premises" insured, at the time when any loss should happen; and the jury found that there was more than that quantity on board the steamer at the time of the loss. Respondents meant and intended to insure the ship *Tinto.* The policy was granted for the ship, the conditions contained in it, therefore, were meant by both parties to apply to the ship; the circumstance that the word "premises" was used in the policy, which is in common parlance applied as descriptive of immoveable property and is in general referable to houses or buildings, will not vitiate the policy against the intention of all parties concerned, as it is sufficiently descriptive of the subject matter of the policy. Respondents knew and accepted the terms of the insurance and were cognizant of the fact that the form used was that for a house, and not a ship policy, though it was intended to apply to a ship. That is sufficient to bind them. *Anderson* vs. *Fitzgerald* (1): Arnould, on *Marine insurance,* (2nd edit.), ch. 15., § 143, p. 394; *McEwan* vs. *Gurthridge* (2); *Stokes* vs. *Cox* (3); Pothier, *Traité du contrat d'assurance,* tome 3, sec. 3, n° 193. Where there is no expressed condition, it is a *contrat aléatoire.* Our contension is that the construction of the policy was a question of law for the court, and not a question of fact for the jury. The finding of the jury, that the owners of the

(1) 4 H. L. Cases, 484.

(2) 13 Moore's P. C. Cases, 304.

(3) 1 Hurt. and Nor., 321, 533.

steam vessel were not precluded by the policy from carrying more than twenty pounds weight of gunpowder, was *ultra vires* and mere surplusage. The judges of the Superior Court and the majority of the court of Queen's Bench in Lower Canada were clearly of that opinion. We submit, that upon the facts found by the jury, as well as upon the true construction of the policy, the Appellants were entitled to judgment.

The Solicitor General (Sir R. PALMER) and Mr. CHARLES E. POLLOCK, for Respondents :

Admitting that the law of England is to prevail, on the construction of the policy, it cannot be contended that the terms of the seventh condition were applicable to the vessel insured, and, if not, certainly they cannot be incorporated into the policy. The whole form of the policy is adopted to houses and buildings and the condition regarding gunpowder is confined to buildings the word " premises " being used, which could only be intended to apply in the vernacular sense to a building, a sense it bears in Acts of Parliament, and not to a vessel known by Appellants to be a trading vessel and described as such in policy itself. New conditions cannot, as now suggested, be inserted into the policy. The civil law gives a more liberal interpretation to commercial assurances.Its essence is equity, and it must not be derogated by technical objections. Emerigon, *on insurance*, (Trans. by MEREDITH) 16 & 17. This doctrine prevails and is adopted in Lower Canada. The exceptional articles, " gas made on the premises," and the use of camphine, indicate the manner in which the assurers meant to deal with inflammable articles. Where anything is intended to be excluded from being used, or housed, or warehoused, on the premises, it is expressly excluded, but the gunpowder we required was not for use but for freight, we were mere carriers. *Soupras* vs. *The Mutual Fire and Life Insurance Company* (1) *Casey* vs. *Goldsmith* (2). Whether the french or english law is to be applied, the contract between the parties is to be carried out in good faith, and here being a *contrat aléatoire*,there being no pretence for saying, and no plea to the effect, that there was fraud or negligence on the part of the assured, the contract must be carried out. The gunpowder in no way led to or increased the loss. *Anderson* vs. *Fitzgerald* (3) and *Lord St. Leonard's* judgment in that case (4). The jury found that as carriers we were not excluded from having gunpowder on board as freight.

(1) 6 *R. J. R. Q.*, p. 28.
(2) 3 *R. J. R. Q.*, p. 144.
(3) 4 H. L. *Cases*, 484.
(4) *Ib.*, 504.

The judgment was delivered by LORD CHELMSFORD:

This is an action upon a renewable time policy of insurance against fire, made by Appellants, the Beacon Life and Fire Insurance Company, of Lower Canada, upon Respondent's steam-vessel *Tinto*, described in the policy as "lying at Sorel, to ply between Quebec and the Upper Lakes;" and the only question which arises in the case is whether part of one of the conditions indorsed upon the policy enters into the contract between the parties. Now the whole difficulty in this case, if really there is any difficulty, has arisen from the company taking a form of policy for insurance upon houses and buildings, and not striking out those conditions indorsed on the policy which were inapplicable to the subject matter insured; but, leaving the question of the application of the conditions to the proviso in the body of the policy to this effect "that this policy and the insurance hereby made shall be subject to the several conditions and regulations herein and hereon expressed, so far as the same are or shall be applicable." During the continuance of the policy, the steamer was entirely destroyed by fire, and the present action was brought against the company to recover the amount of the insurance. The declaration, it has been observed, negatives the fire having been brought within any of the exceptions which are contained in part of the seventh condition, thereby admitting that part, at least, of the condition enters into the insurance. The company pleaded, amongst other pleas, that the policy of insurance in the declaration mentioned was made by the Defendants under and subject to certain conditions and regulations therein and thereon expressed; and, among other things, that if more than 20 lbs weight of gunpowder should be on the premises at the time when any loss happened, such loss would not be made good. And the plea averred that, at the time, the *Tinto* was destroyed by fire, there was on board the vessel a larger quantity of gunpowder than 20 lbs weight. The parties being at issue, by the provisions of a provincial statute, the questions to be submitted to the jury were determined by the court, and one of those questions, the only one necessary to be considered, is the third, viz., at the time the steamer *Tinto* was so consumed by fire, was there any quantity of gunpowder on board the steamer: and, if so, what weight or quantity? Upon the trial, that question, with the others, was submitted to the jury, and they returned for answer: "Yes, we find that a package containing about 100 lbs of powder was on board, as freight, and which the owners of the steamer were not precluded by their policy from carrying." It is quite clear, it is admitted, indeed, by all the Judges, and there can be no question about it, that the latter words of this finding,

" and which the owners of the steamer were not precluded by their policy from carrying," were beyond the province of the jury. It was taking upon them to decide upon the construction of the contract. I suppose that the course, in the province, in these cases, where the jury are required by the provincial statute to find a special verdict, that is, not a special verdict as the term is understood in this country, but to answer distinctly to the different questions which are settled by the court to be proper to be submitted to them, is, that an application is afterwards made to the court to apply the verdict. Accordingly, such an application was made by Defendants in the action ; and, in addition, there was a motion to strike out the words to which I have referred in the finding of the jury. There was perhaps, no necessity for this motion, as the latter part of the finding of the jury might have been treated as mere surplusage ; but the Superior Court took it into consideration, and decided that the words ought to be struck out from the answer of the jury ; and then gave judgment for Defendants. From this judgment there was an appeal to the Court of Queen's Bench, and, after argument, the court was divided, three judges being in favour of Respondents, and two in favour of Appellants. The judgment of the Superior Court being also in favour of Appellants, there has been an equality of opinion amongst the judges who have had to decide the question in the courts of the province. Two of the judges, the Chief Justice and Judge MONDELET, who were in favour of Respondents, were of opinion that the word " premises " was applicable in the seventh condition to the case of a steamer, but their decision proceeded on the ground that a policy of insurance was a *contrat aléatoire*, which must be carried out in good faith, and that the company could not be relieved from their responsibility to answer for the loss, without proof of deception and fraud, and a further proof that the fire had extended by reason of more than the limited quantity of gunpowder being on board. There was not the slightest ground for suggesting any deception or fraud on the part of the company, and, as to its being necessary to give proof that the fire had extended by reason of a breach of the condition, this seems to introduce into the contract an entirely new term. It is important to observe that, in this very seventh condition, there are instances in which the company have expressly stipulated that they shall not be liable for any loss or damage which has been occasioned by or through certain circumstances, as explosion in one case, and the use of camphine in another, thereby distinguishing in terms between those cases where the loss must be brought home to the specified cause, or to the use of the prohibited article, and the case in question of their not

being answerable where there are more than 20lbs weight of gunpowder on board, whether it has occasioned the loss or not. Mr. Justice BADGLEY, in part of his judgment, seems to think that the condition is not applicable at all to the case of a steamer; but, at the close of it, he takes a different view, and says the contract may be fairly read as follows: "We will insure your freight steamer; we know that gunpowder is an article of freight and transportation in steamers; but, if you keep on board for use, more than 20lbs, and the vessel take fire, we shall not be responsible for the loss." Here, again, the contract is construed against the company, by the introduction of words which entirely change its meaning and effect, and an absolute prohibition against having more than a certain quantity of gunpowder on board is rendered inapplicable by inserting the words "for use" into the condition. In the argument, before Their Lordships, it has been contended, on the part of Respondents, that, from the use of the word "premises," the parties could not have intended that the part of the seventh condition in question should apply to the steamer insured; and that there were extrinsic circumstances to show that it could not have been in the contemplation of the parties that the word "premises" should be so understood. In order to construe a term, in a written instrument, where it is used in a peculiar sense differing from its ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the word, but, it is not admissible to contradict or vary what is plain. Now the word "premises," although in popular language, it is applied to buildings, in legal language, means "the subject or thing previously expressed," and the question here is, in what sense this word is used, which must be gathered from the contract itself, and not from any external evidence. As Lord Denman says, in a case of *Rickman* vs. *Carstairs*, in 5 Barnwall and Adolphus, 663: "The question, in this and other cases of construction of written instruments, is not what was the intention of the parties, but what is the meaning of the words they have used." Supposing, however, that evidence was admissible in this case, for the purpose of proving that, by the use of the word "premises," the parties did not intend to include the steamer, the subject matter of the insurance, what is relied upon appears to be entirely insufficient to render the condition inapplicable. It is said that this insurance was upon a trading steamer; that it was the usage of steamers of this description to carry gunpowder on freight; that this was known to the company, and, therefore, it must be taken that they did not mean to include this portion of the seventh condition in the insurance. But assume that it was notorious to the company that it was the usage of the steamer of this des-

cription to carry gunpowder upon freight, why should they not, for that very reason, desire to limit their risk by preventing more than 20 lbs of such a hasardous article being carried at any one time ? If the condition is not to be considered part of the contract, this strange consequence will follow : that it being clear to the parties insured that the company desired to guard themselves in the case of houses and buildings from the hazard of there being upon the premises at any one time more than a limited quantity of gunpowder, and having excluded gunpowder altogether from those hazardous risks for which an additional premium is to be paid, the conditions stating that gunpowder under no circumstances, is to be insured, this steamer might, during the whole continuance of the policy, carry backwards and forwards cargoes of gunpowder, the company receiving no premium for the additional risk incurred ; and, in case of the vessel taking fire and being burnt, though not originally by an explosion, but, of course, the gunpowder contributing materially to extend the fire, the company would be answerable for the loss. The question then is, whether, assuming under these circumstances that it was more probable that the prohibition with regard to the amount of gunpowder should be included in the contract between the parties than not, whether the word " premises " must not receive a reasonable construction, which would make it apply to this particular contract. Now it is quite clear that the popular sense of the word is excluded, because there are no buildings to be insured. Then it only remains to give it that meaning which the reasonable construction of the contract requires. Judge MONDELET says, that " the form of the policy is one which should not have been made use of relative to a steamer. But, inasmuch as this policy, though improper, has been accepted by the insured, and they must be taken to have read it, since they have signed it, it is right and just that the word " premises " should be interpreted against them, and adjudged to refer between the parties to the steamer, which was the object, the sole object, insured." If, then, this condition is applicable to the subject insured, the only question which arises upon it is, whether the facts bring the case within the condition upon which the finding of the jury, that there were at the time of the fire more than 20 lbs weight of gunpowder on board, is conclusive. Under these circumstances, it is quite immaterial whether the fire was or was not occasioned by more than the specified quantity of gunpowder being on board. The parties have agreed to this, as a condition in the policy, and the cases which have been adverted to, of the effect of deviations upon marine insurances, are good illustrations of the way in which parties are bound by contracts of this

description. It is familiar law that a wilful deviation, although the loss is not occasioned by, or attributable to it, exonerates the underwriters from liability. So, again, take a life policy. We know that in England, these policies invariably contain a stipulation that the insured is not to go beyond the limits of Europe. Now, if the party insured goes, even for an instant, out of Europe, though without the least injury to his health, this condition of the policy attaches, and the policy becomes void. This being so, all that remains for Their Lordships to say on the present occasion, is, that it being admitted that this condition is applicable to the case of the steamer, the subject insured, and it having been found that the condition has been broken, the judgment of the Superior Court was a correct judgment, and the judgment of the Court of Queen's Bench reversing that judgment, cannot be supported. They will, therefore, recommend to Her Majesty that the judgment of the Court of Queen's Bench be reversed, and the judgment of the Superior Court be affirmed; and that the Respondents should pay the costs in the Queen's Bench and also the costs of this appeal. (7 *J.*, p. 57; 13 *D. T. B. C.*, p. 81, et 1 *Moore's Privy Council Rep. N. S.* p. 73.)

MAINMORTE.—CHEMIN DE FER.

COURT OF QUEEN'S BENCH, IN APPEAL.

KIERZKOWSKI, Appellant, *and* THE GRAND TRUNK RAILWAY COMPANY OF CANADA, Respondent.

(Cette cause est rapportée dans VI *R. J. R. Q.*, p. 124, mais les opinions des juges DUVAL et AYLWIN ont été omises par accident.)

DUVAL, Justice: I cannot look on the Grand Trunk Company as coming within the definition of *gens de mainmorte.* It is, in my opinion, a joint stock association entered into for the purposes of trade, and for a profitable investment of capital. With the view of encouraging persons to an active and useful employment of their capital, a species of partnership has been introduced in different parts of Europe and of America, which may be called a *quasi* corporation, and which, therefore, says Mr. Angell, is entitled to attention in treating of private civil "commercial" corporations. No law prohibited its formation without *lettres d'amortissement;* its creation depended entirely on the will and understanding of its members, they might stipulate together precisely as they pleased, and, as the members of any ordinary partnership or joint stock association, it might acquire property, real and personal, and dispose of the same, governed by the same laws of the

country which regulate the transfer of property by one individual to another. Should new rails be required to lead to the Victoria bridge, is there any law prohibiting the company acquiring the ground required, and selling that now leading to the Longueuil wharf ? I am aware of no incapacity created by law applying in a peculiar manner to this association. In all its transactions, the company has to look to the same laws which obtain in the case of the other members of society. As its creation depended on the will of its members, the same will may cause its dissolution at any time. In what character then would the Grand Trunk Company have been viewed in our courts of justice, previous to the passing of the statutes that have been referred to ? Decidedly, as a private partnership, or an association for trading purposes and a profitable investment of capital, the laws of mortmain could no more be applied to such a partnership, than they can to any one of the numerous firms carrying on trade and commerce, at this day, in the cities of Quebec and Montreal. I come now to the provincial statutes referred to. In what respect have these statutes changed the character of this company, and brought it within the laws of mortmain ? I find that by these statutes, the shares are declared *moveable* and made transferrable as such ; the actions instituted by the company are declared to be of a *commercial* nature, and the rules of evidence laid down by the laws of England made to apply ; the company may become a party to bills of exchange and promissory notes. I cannot but believe that a well read person in the laws of mortmain would stare when, after reading such statutory enactments, he were told : *Voilà des gens de mainmorte.* Add to this the enactment enabling the government to purchase, after 21 years, most conclusively shewing that the legislature viewed this as a money speculation, and in no other light whatever. Bearing in mind the provisions of these several statutes, let us see what the french writers say on the subject of *gens de mainmorte.* Hervé, vol 6, p. 429, thus writes : " *Tous les corps sujets au droit d'amortissement sont appelés* " *gens de mainmorte, sans doute parce que les biens qui leur* " *appartiennent ne recevant ni mouvement ni circulation,* " *sont dans une espèce d'état de mort, relativement au* " *commerce, ou relativement aux profits casuels, doma-* " *niaux et féodaux, dont ils sont affranchis par l'amortisse-* " *ment.*" What statute has put the property of the Grand Trunk *hors du commerce ?* None. If so, the very reason assigned by all the french writers in support of the seignior's claim may be conclusively opposed to them in this case. But we have been referred to judgments pronounced by the courts in France, granting the seigniors the *droit d'indemnité* in case

of purchases made by *les corps et métiers*, and these decisions, it is argued lay down the principles by which we are to be governed in the present case. I answer there is no analogy whatever between the *corps et métiers* referred to and the Grand Trunk. In France, it was the *trade*, the *corps*, that was incorporated, not the individual. For instance, the *corps des marchands* had its charter, and any one being a *marchand*, might become a member. The individual was nothing, it was the trade, the *corps*, that the law recognized ; this body retained its existence, independent of the will of any and of all its members. It did not owe its origin to them, its statutes could not be affected by them, it was created on grounds of public policy, as understood at the time, and, on these grounds, it was preserved and protected by the state. For the rise and progress and the abuses flowing from the privileges granted to these bodies. See 1st vol. of Say, *Economie politique.* Not so with the company before us. The act of incorporation 16 Vic., cap. 37, is not in favor of any trade, but it is in favor of several individuals therein named, the hon. Peter McGill, of Montreal, the hon. Geo. Pemberton, of Quebec, and others their heirs, executors and assigns. I cannot infer anything against them from the fact of their having perpetual succession. This clause was inserted in their favor, and cannot now be so interpreted as to be prejudicial, instead of beneficial, to their interests, by subjecting them to a part of those feudal laws which the country has lately abrogated. Further, the statute, 16 Vic., cap. 5, sec. 8, declares the company a body corporate, invested with all the powers, privileges and immunities necessary to carry into effect the statute, and such as are expressed or included in the interpretation act. Referring to this last statute, we find the legislature explaining what powers are vested in such a corporation or body politic. Is there one word of the law of mortmain in all this ? It will not be asserted, seriously, that the law of mortmain was one of the immunities and privileges which our legislature intended to confer on the company. In no part of the statutes can I find any thing that would justify the terms : *gens de mainmorte*, being applied to this company. That it cannot be assimilated to the *corps et métiers* in France, I think very plain. A reference has been made to several statutes in which it is pretended that this *droit d'indemnité* is recognized in favor of the seigniors. It must be acknowledged, the legislature, in passing these statutes, did not intend to transgress the boundaries of legislation and assume the exercise of judicial powers to settle the important and difficult questions that might arise between seigniors and *censitaires.* According to my reading of the statutes, the legislature intended to confer

on the seigniors no rights that did not previously exist, to subject the *censitaires* to no claims not recognized by the existing laws. The clause referred to, repeated in several subsequent acts, was inserted with a view of removing all doubts, by reserving to the seigniors the exercise of the rights to recover the *droit d'indemnité,* if any such existed in their favor. Such a clause is of frequent occurrence in contracts, and the rule of interpretation is well laid down in the following words: *Quâ dubitationis tollenda causâ contractibus inseruntur jus commune non lædunt.* The clause, therefore, cannot influence my opinion in this case. Why, then, some person will ask, did the Railway Company demand an act of incorporation? Such a question will not be put by a well read practical lawyer. But being put, it ought to be answered. When it is considered for the public advantage to have any particular rights kept on foot and continued, it has been found necessary to constitute artificial persons, called bodies politic, bodies corporate, a corporation. These persons, united into a corporation, are considered, together with their successors, as one person in law; as such, they have one will, expressed by the majority, they promulgate rules binding on the whole, the privileges and immunities, the estates and possessions of the corporation, when once vested in them, are forever vested without any new conveyance; in one word all the individual members are one person in law that never dies. The corporate name represents this one person. By this name, the corporation is known, in its name all its transactions are carried on. Incorporated for such purposes, how I ask, can we apply the laws of mortmain to it? Would it be incapable of taking by bequest? I know of no grounds on which the validity of such a bequest could be questioned. To resume, the claim against the Grand Trunk must rest on one of two grounds; 1st, the company is to be considered as *gens de mainmorte;* 2nd, it is to be assimilated to the *corps et métiers* in France. For the reasons above given, my opinion is against the seigniors' claim on both grounds. 16 V., cap. 37, § 34. I gave my opinion on this clause, at the time of the argument. It would be absurd so to interpret the clause as to defeat the existing pecuniary claims of the seigniors founded on positive laws, claims recognised by all the courts of law in the country. The legislature had no more intention of doing away with these claims, than it had of denying the right of action for the recovery of debts due to the shopkeepers and bakers of the country. The one act of legislation would be about as reasonable and moral as the other.

AYLWIN, Justice: In determining the questions now submitted to the court, the consideration which at the outset pre-

sents itself is, that the case is one of the first importance, more particularly as to the *droit d'indemnité*, which according to the position of Mr. De Bessieux "*est sans contredit* une charge *foncière* établie par *l'usage*." (1) Usage in France was by no means certain. There was no written law, or express article of the french customs regulating the subject in general, and, even the *Edit du mois d'avril* 1667, was never enregistered by the *Conseil supérieur* at Quebec, and is therefore not law here. The transaction, in respect of which the seignior here lays claims to the *droit d'indemnité* is one *sui generis, exorbitante du droit commun.* It is not an ordinary contract, formed by the will and consent of the parties concerned in it; but, its efficacy is dependent upon a positive and express law, an act of parliament, which though a public statute, is yet *a privilegium.* This statute requires to be expounded in order to ascertain if the legislature who enacted it contemplated or intended that in carrying out its provision, the *droit d'indemnité* should attach in favor of seigniors. Legislation upon railroads and their construction and management, by corporate companies as commercial entreprises, is so modern, and belongs so particularly to this age of legal history, that it seems to repel the successful application of the rules concerning feudal rights dependent upon usage. The leading principle of the old law upon the subjet of the *droit d'indemnité* being that it is due," pour les cessions en paiement " de créances, abonnements, exponces, déguerpissements, *et généralement pour tous les actes translatifs ou rétrocessifs de propriété*." The first point to be disposed of in the present case is, whether the agreement evidenced by the deed of the 12th April, 1853, and declared upon by the seignior who was Plaintiff in the court below, is an *acte translatif* or *rétrocessif de propriété* to the Grand Trunk Railway Company of Canada. Now the land in respect of which the *indemnité* is claimed, was, at the date in question, the property of a corporate body or commercial joint stock company, established by the provincial statute of the 8th Vict., cap. 25, by the name of," The St. Lawrence and Atlantic Railroad Company." The company had acquired the land by purchase from different private individuals, had paid to the seignior his *droit d'indemnité* upon that purchase; and been confirmed in good and lawful seizin and possession by him. The property having thus vested in this company, before a second claim of indemnity can be made, it is absolutely necessary for the seignior to shew that it had been devested out of them, and that it has passed to the Grand Trunk Railroad Company by a *titre translatif de pro-*

(1) Répertoire de Guyot, vbo *Indemnité*, page 160.

priété. The agreement which, as the seignior contends, gives him a claim to the *droit d'indemnité*, depends upon the will of the Legislature, as expressed in the statute of the 16th Victoria, cap. 39, of which the preamble is as follows: " Whereas it would be *to the advantage of this province*, " that the Main Trunk Railway, throughout the whole " length thereof, should be under the management and " control of one company, or of *as small a number of diffe-* " *rent companies* as may be practicable :" so as to effect this end, the several companies mentioned in the act, are authorised to adopt one of the two courses, it is made lawful for the directors of any one of them, " to agree with the " Directors of any other such company or companies, that " the companies they respectively represent shall be united " as one company, or that one of such companies shall " purchase and acquire the property and rights, and take " upon itself all the liabilities or other of others ;" and, by such agreement, *to fix the terms upon which such union shall take place, the rights which the shareholders of each company shall possess after such union, &c.* In this statute, it is declared that " the provisions of this act shall " apply to and include the St. Lawrence and Atlantic " Railroad Company, and *the whole of the railway which* " *that company* are *impowered to construct.*" Necessarily, that portion of the railway, running through Mr. Kierzkowski's seigniory now in question, like all the rest, is comprised within the act. This statute further provides that upon the ratification of any agreement made under it by three fourths or more of the votes of the shareholders, " then the same shall have full effect accordingly, as if " *all the terms and clauses thereof* not inconsistent with " this act *were enacted in an act of the Legislature of* " *this province.*" If the Saint Lawrence and Atlantic Railroad Company, had sold and transferred, and the Grand Trunk Company had "*purchased*" and "*acquired,*" *the property and rights, and taken upon itself all the liabilities* of the other in the terms of the statute, no doubt, the act would have been *translatif de propriété. The jus in re and dominium* or fee simple would have passed from one company to the other, leaving nothing to the vendor, and vesting every thing in the vendee, and dissolution of the corporation vendor would be operated. In such case, the transaction would have been one forming the subject matter of a claim to the exercise of the *droit d'indemnité* by the seignior. But the mode pointed out first in the act, was that actually adopted, and not that of purchaser, and the Legislature has, in express terms, defined the legal attributes and conse-

quences of adopting this mode. " From and after the time " when any such ratified agreement for the union of two " or more companies shall take effect, the companies in- " tended to be united shall become *one company and one* " *corporation*, by the corporate name assigned to it in such " agreement, and shall be invested with and have *all* " *the rights and property* and be responsible for *all the lia-* " *bilities of the respective companies, parties* to such agree- " ment, and *shall be held to be the same corporation with* " *each of them*, so that *any right or claim which would be en-* " *forced by or against each of them*, may after such union, " be enforced by or against the company formed by their " union, and any suit, action or proceeding pending at " the time of such union, by or against either of such com- " panies, may be *continued and completed by or against the* " *company* formed by their Union, by the corporate name " assigned to it by the Agreement." The statute of the 18th Victoria, cap. 33, sec. 2, has expressly confirmed the agreement between the several railroad companies, bearing date the 12th April, 1853, which has been declared upon in this cause by the seignior. With reference to the union operated by the consent of the several companies, it is termed in the act, " the *amalgamation* of the said several companies," and it is also expressly confirmed as such. Now, how has this amalgamation been effected ? By the 74th article of the agreement, " the stock or shares of the " St. Lawrence and Atlantic Company, shall become stock or " shares of the same nominal amount in the capital of the " United Company, and shall rank in the register of the United " Company, as stock or shares upon which so much is paid as " shall at the time of the amalgamation have been actually " paid thereon." The stock of the single company is converted into stock of the union or amalgamation of companies. If the stock of the St. Lawrence and Atlantic Railroad Company had been real property, there might have been the subject matter of a *mutation de propriété*, or an *acte translatif de propriété* under this agreement, but, by the acts of incorporation of that company, it is declared that " the shares be deemed *personal estate*, and shall be transferred as such," section 21 ; the individual shareholders acquired no right of property, *no jus in re*, in relation to immoveables, *biens immeubles*, the corporatio as an *ens rationis* had *alone* the property in trust for the individual. By the terms of the act of incorporation, each share of stock was the representative of the sum of £50, the aggregate of the shares was the capital of the company. No sale or transfer of individual shares, even though comprising the whole amount of capital stock, can affect the *jus in re*

of the corporation as to immoveables. The *dominium* or fee simple remains unaffected by any disposal of the stock or shares. No seigniorial rights can arise in respect of personal property, or its disposal and transfer. The conversion of stock, amalgamation or fusion, operated by the agreement, is not a *mutation de propriété* or *translatif de propriété*, upon which the *droit d'indemnité* can be claimed. The stock is changed, but the *dominium* in the realty is unaltered. It has been argued that the corporation of the St. Lawrence and Atlantic Railroad has been dissolved, and that a new corporation has been created, distinct from the old one, and in this manner, a mutation of property has been operated. This argument is met at once by the legislative enactment already adverted to, " the companies intended to be united shall become *one* " company and *one* corporation and shall be held to be the " *same corporation* with *each* of them." If pronounced the *same* by the legislature, it cannot be distinct from the old one, there has been no dissolution and no merger of rights, " any right or claim which could be enforced by or against " *either* of them, may after such union be enforced by or " against the company formed by their union." So long as the union lasts, the powers of the separated individual corporations are in *suspenso*, but they continue to exist, so far as to retain the *dominium* in their real property, and in the event of a separation, they would revive in their pristine form ; actions by or against them did not *abate*, but might be continued in the new name. The St. Lawrence and Atlantic Company holds a lease for 999 years of the Portland Railroad in the state of Maine, it will not be argued that this lease has been impaired or affected as to the lessors by this union. It is undeniable that before the amalgamation or union, the St. Lawrence and Atlantic company had a right to that portion of their road which runs through the *seigneurie* in question, and that the seignior could claim no *droit d'indemnité* in relation to it against them. The statute has enacted that the company formed by the union may enforce that right, as well as all other rights of property, and no claim for indemnity can be brought against the union, which could not before be urged against the St. Lawrence and Atlantic Company : *Which shall be held to be the same corporation*. In adjusting the terms of the agreement declared upon, regard was had to the arrears of interest due to the stockholders of the St. Lawrence and Atlantic Railroad Company amounting to £75,000. Could the parties contemplate payment of a second *droit d'indemnité* to the seignior ? The liabilities of that company were assumed by the union, but second *indemnité* was no liability of theirs

it could only arise after the union. The agreement makes no provision for the second *indemnité*, and the Legislature has confirmed this agreement, the conditions of which have expressly the force of law ; how then can the seignior maintain an action founded upon the agreement ? If the *droit d'indemnité* be recognized in this case, the liability of the union to all the seigniors through whose seigniories railroads pass, would amount to so a large sum, as to form an important element in the terms of the agreement. No doubt in the case of an ordinary contract. the parties if by law liable for the indemnity, would be held to pay it; but in the case of an agreement entered into *annuente* the Legislature, and the conditions of which are declared to have all the force of law and to be laws of themselves, such a claim on the part of the seigniors, after having already received one *droit d'indemnité* seems to me preposterous. The fact that there has been no mutation of real property, and there has been no *translation* of property, from one party to another, but that the union is declared to be the same corporation as the St. Lawrence and Atlantic Railroad Company offer arguments so strong against the seignior's claim that I am convinced that the courts in old France would never, under such circumstances, have rendered an *arrêt* recognizing any such *droit d'indemnité*, and I am prepared unhesitatingly to reject the claim now urged. The claim of the seignior in this case has also been resisted under the Seigniorial Act of 1854, section 34. This section is no doubt involved in its wording, but I believe that the Legislature intended by this enactment to meet the very claims now urged by the seignior. In any case, the section cannot be made a dead letter, but is to be carried out, and the hardship of an *ex post facto* law, is not, to my mind, very apparent in the present instance. Upon this head I shall forbear from going into further details, and may content myself with reference to what fell from Mr. Justice BADGLEY in the court below. (6 *R. J. R. Q.*, p. 106.) Being of opinion that there has been no mutation of property at all, the claim for *lods et ventes* is at once disposed of, as it is restricted by law to the contract of *sale* of real property, and to contracts in the nature of a sale, *équipollent à vente*, and does not, like the *droit d'indemnité*, extend universally to every species of contract. Admitting hypothetically that there has been a mutation, it yet can only be, as expressed in the agreement, one of stock between one company and the union ; stock being personal estate, the mutation would produce no *lods et ventes*. If regard be had to the terms of article 74 of the amalgamation agreement, which is that upon which the claim of the seignior is predicated, it will be found that it converts

the stock of the St. Lawrence and Atlantic Railroad Company into stock in the capital of the United Company of the same nominal amount. This would be at the utmost an exchange, a contract which by law is not productive of *lods et ventes*, even with respect to a mutation of real property. It is true, that upon such an exchange, if there be a *soulte* or a pecuniary sum given to boot by the owner of one of the immoveables (*immeubles*) interchanged, to the owner of the other, *lods et ventes* are due upon the amount of the *soulte*. In the present case, however, there is no *soulte*. The £75,000 assumed by the union, is so assumed as part of the liabilities and obligations of the United Company. The stockholders of the St. Lawrence and Atlantic Company must contribute rateably to the payment of this sum, just as the other stockholders of the United Company. But it is expressly stated in the agreement that the sum is the estimated amount of the arrears of interest due to the shareholders of the Saint-Lawrence and Atlantic Company. The two stocks being estimated as equivalent in value and mutually convertible at par, it is manifest, that if one party has received all arrears of interest or dividends and the other has not, the amount of interest or dividends due, is not a *soulte* or anything given to boot. The St. Lawrence and Atlantic stockholders, in consequence of their liability to contribute to the payment of the sum, would in fact receive less than the other stockholders. The ordinary transactions, known upon change as exdividend, explains the position of the parties, the amount of dividend or of interest due neither adds to nor subtracts from the estimated or the *intrinsic* value of the stock. But, even upon the supposition that the stock of the St. Lawrence and Atlantic Company were more valuable than that of the union, the difference in value of the two stocks would afford no criterion for estimating the price or value of the real property belonging to either company, or any part of that property. The value of the stock of a company depends upon its profits, and its estimation in the market, its rise or its fall, does not necessarily affect the value of the real property belonging to it, in a corresponding degree. A rise of 10 per cent. in the value of the St. Lawrence and Atlantic stock, of itself, would not augment the value per rod of any portion or the whole of their railway or buildings any more than that of their rolling stock. *Lods et ventes* are a mutation fine payable upon the *contract price* of real property sold, with us being fixed at one twelfth of such price, it is not like the *droit d'indemnité* to be calculated upon the *value* of *the property*. As the price of railroad stock affords no measure of value to real property comprised within it, no transaction, in relation to its sale or purchase or acquisition in any

shape, can be productive of the *droits de lods et ventes* as claimed in this case by the seignior. The Railroad Company have also met the claim for *lods et ventes* by a plea of exemption on the ground that the supposed mutation was a public transaction, beneficial to the public, *d'utilité publique.* I am of opinion that this plea should be sustained. The Legislature has recognized the Grand Trunk Railroad as being *d'utilité publique* by giving to it the guarantee of the province to an enormous amount and by participating actively in the direction and management of its affairs. The preamble to the statute of the 16th Victoria, cap. 39, already cited, proclaims the advantage to the province of this work. "The number of directors of the company formed by such union" it is enacted, "shall be eighteen, twelve of whom shall be elected by the shareholders and six appointed by the governor of the Province of Canada, so long as and until such company shall renounce the benefit of the provincial guarantee, in which case the number of directors shall be reduced to twelve by the retirement of the directors appointed by the governor, and if there sha?l be at any time of such union, directors of more than one of the companies forming the same who have been appointed by the governor of Canada, then such of the said directors as the governor shall designate, shall retire from office so as to reduce the number of government directors to six, &c." As to roads, they have been recognized in the earliest times as falling under the *trinoda necessitas.* The grants made by the kings of France to the seigniors, are subject to a provision for roads and highways, and the patents from the crown contain the customary reservation for roads and highways. Their value, with a view to settlement, is obvious in a country like Canada, and nothing can be more conducive to *utilité publique.* Upon the acknowledged principles of the feudal law, the agreement in question, should be held exempt from the *droits de lods et ventes.* The judgment of the Superior Court seems to me well founded in every respect, I conceive the claims urged by the seignior to be wholly unreasonable and would therefore affirm the Judgment of the court below, with an award of the costs against him. (10 *D. T. B. C.*, p. 481.)

FAITS ET ARTICLES.

BANC DE LA REINE, EN APPEL, 1er septembre 1860.

Présents : Sir L. H. LAFONTAINE, Baronnet, Juge-en-Chef, AYLWIN, DUVAL et MONDELET, Juges.

LANTHIER, Appelant, *et* D'AOUST et ux., Intimés.

Jugé : 1° Qu'une partie interrogée sur faits et articles et requise de donner le détail des valeurs par elle fournies à la partie adverse, sur lesquelles était basée une obligation consentie par cette dernière et de produire un compte détaillé des effets et marchandises, si la dette avait cette cause : est tenue de le faire, et sur défaut, les interrogatoires seront pris pour avérés. (1)

2° Que cette partie ayant refusé de répondre, lorsque assignée à cet effet, ne peut, lors de l'audition aux mérites obtenir la permission de le faire.

Le 16 septembre 1858, J. B. D'Aoust et son épouse consentirent au Demandeur une obligation de £82 12 6, payable conjointement et solidairement par eux, à demande, avec intérêt du 16 septembre 1858. L'action était portée pour le recouvrement de cette obligation, en capital et intérêts. A cette action, les Défendeurs répondirent qu'ils avaient, de fait, consenti l'obligation, mais qu'ils n'avaient jamais reçu valeur pour la somme y portée, qu'il n'y avait jamais eu de règlement de règlement de compte entre eux ; que le Demandeur avait dit aux Défendeurs qu'il était leur créancier pour ce montant, mais sans donner de détail ; que les Défendeurs devaient une certaine somme, dont ils ne pouvaient préciser le montant, mais qu'elle n'excédait pas £20 ou £25 ; que, sur la promesse de longs et grands délais, et sur l'assurance qu'ils devaient le montant que le Demandeur leur disait lui devoir, ils avaient consenti l'obligation ; qu'ils avaient le droit de la faire réduire à la seule somme qu'ils pouvaient devoir au Demandeur, environ £20 ou £25 ; que le surplus d'icelle se trouvait avoir été consenti sans cause ni valeur, et que l'obligation devait être réduite en conséquence. Et ils concluaient à ce que l'obligation du 16 septembre 1858, fût réduite à la somme de £20 ou £25, seule somme que les Défendeurs pouvaient devoir au Demandeur avant sa passation et le surplus débouté. Réponse générale. Les Défendeurs interrogèrent le Demandeur sur faits et articles, et, entre autres questions à lui soumises, se trouvaient les suivantes : Interrogatoire 6e. " N'est-il pas vrai que le Défendeur ne vous devait, lors du 16 septembre 1858, qu'une somme de vingt à vingt-cinq louis environ ? " Si le Demandeur répond négativement à cette question, il lui sera posé les questions suivantes :

(1) V. art. 225 et 229 C. P. C.

" 1° Quelle était, au 16 septembre 1858, et avant, la nature de votre créance contre le Défendeur ? 2° Si c'était pour effets et marchandises, à lui fournis et livrés, donnez-en le détail ? 3° Si c'était à d'autres personnes, donnez-en aussi le détail, en spécifiant la date, les effets, le prix, à qui livrés, sur l'ordre de qui ? L'ordre était-il ou non par écrit ? S'il était par écrit, produisez-le ? 4° Produisez le compte en détail que vous aviez contre le Défendeur, le 16 septembre 1858 ? " A ces interrogatoire l'Appelant répondit comme suit : Au sixième interrogatoire, répond : " Le 16 septembre 1858, la somme qui *paraissait* due par le *Défendeur*, à moi, était de £72. J'ai payé " pour l'obligation et l'enregistrement douze schellins et demi, " qui sont inclus dans l'acte. Depuis ce temps, j'ai trouvé une " erreur *de cinq schellings et demi* au préjudice du Defendeur." Les quatre sous-interrogatoires suivants étant lus au Demandeur, au premier il répond : " La nature de la créance que le " Défendeur me devait était pour marchandises vendues et " livrées, pour grains et argents avancés. Quant aux trois autres sous-interrogatoires, *je ne réponds pas.*" Le 6 février 1860, les Intimés firent motion : " qu'attendu que le Demandeur n'a pas répondu aux 2e, 3e et 4e sous-interrogatoires, le 6e interrogatoire à lui soumis, et qu'il a enregistré qu'il ne répondait pas aux susdits sous-interrogatoires, le 6e interrogatoire soit en conséquence pris pour avéré et reconnu, en autant que le Demandeur a refusé de donner les détails qui lui sont demandés, et qu'ainsi la créance du Demandeur soit réduite à la somme de £25, le plaidoyer des Défendeurs référant spécialement au détail du compte et au cas que le dit sixième interrogatoire ne serait pas pris pour avéré et reconnu en tout ou en partie, il soit alors enjoint au Demandeur de venir répondre aux 2e, 3e et 4e sous-interrogatoires. Le 17 février 1860, la cour prononça l'interlocutoire suivant : " La cour ordonne, avant faire droit, que le Demandeur comparaisse aux séances d'enquête de cette cour, jeudi, le premier jour de mars prochain, à dix heures du matin, pour, là et alors, répondre aux 2e, 3e et 4e sous-interrogatoires du sixième interrogatoire à lui soumis par les Défendeurs." Le 1er mars " 1859, l'entrée suivante fut faite au registre : " The Plain- " tiff appears, in obedience to the interlocutory order of " this court of the 17th February last, but *declines* answering " the interrogatories therein specified." Le 17 mars 1860, l'Appelant inscrivit la cause *de novo*, pour audition aux mérites le 26 mars 1860. *Les Intimés* firent alors motion, " que, vu le refus du Demandeur de répondre aux 2e, 3e et 4e sous-sous-interrogatoires du 6e interrogatoire à lui soumis, et que le 6e interrogatoire n'a pas été répondu catégoriquement, le dit 6e et les 2e, 3e et 4e sous-interrogatoires, soient pris pour

avérés et reconnus *pro confessis* contre le Demandeur, et qu'ainsi la créance du Demandeur soit réduite à la somme de £25." Le Demandeur fit motion "qu'il lui soit donné acte de la déclaration qu'il fait, qu'il a entendu répondre d'une manière catégorique au sixième interrogatoire, et qu'il a cru l'avoir fait jusqu'au moment où, ce jour même, l'honorable juge SMITH a exprimé l'opinion que la réponse faite par le Demandeur au dit interrogatoire n'était pas, dans l'opinion de l'honorable Juge, suffisamment directe, positive et catégorique, et, en conséquence, le Demandeur demande à être reçu à répondre de nouveau au dit 6e interrogatoire." Le 31 mars 1860, la cour prononça le jugement final suivant : "The court considering that Plaintiff hath refused to answer the second, third and fourth interrogatories, subsidiary to and dependent on the sixth interrogatory submitted by Defendants to Plaintiff, and, further, considering that the answer put in by Plaintiff to the sixth interrogatory, is not answered in a clear and decisive manner, and that Defendants are thereby in law entitled to consider the said sixth interrogatory as not answered, and to be entitled thereby to claim that the said sixth interrogatory be taken as averred, and answered in the affirmative ; the court doth reject the motion of Plaintiff to be permitted to answer *de novo* to the said sixth interrogatory ; and further considering that thereby Defendants have established the truth of the matters and things set up in the exception by them pleaded to the action of Plaintiff, and that it appears therefrom that Defendants are not indebted and were not indebted to Plaintiff on the 16th September, 1858, in any greater or further sum than twenty-five pounds, the court doth condemn Defendants to pay to Plaintiff, for and by reason of the matters and things set up in the declaration of Plaintiff, the sum of twenty five pounds, current money of the province of Canada, with interest thereon from the 16th September, 1858. Sur appel, ce jugement a été confirmé. MONDELET, Juge, différant. (10 *D. T. B. C.*, p. 497.)

DOUTRE et D'AOUST, pour l'Appelant.

MOREAU, OUIMET et MORIN, pour l'Intimé.

TABLE ALPHABÉTIQUE

—DES—

MATIÈRES CONTENUES DANS CE VOLUME.

A

B

C

D

E

F

G

H

I

J

L

M

N

O

P

Q

R

S

T

V

STATUTS IMPÉRIAUX.

ORDONNANCES

DU GOUVERNEUR ET DU CONSEIL LEGISLATIF DE LA PROVINCE DE QUEBEC.

STATUTS DU BAS-CANADA.

ORDONNANCES DU CONSEIL SPÉCIAL.

STATUTS DU CANADA.

STATUTS REFONDUS DU BAS-CANADA DE 1861.

STATUTS REVISÉS DU CANADA DE 1886.

STATUTS REFONDUS DE QUÉBEC.

CODE CIVIL.

CODE DE PROCÉDURE CIVILE.

CODE CRIMINEL.

CODE MUNICIPAL.